STATEMENT AS TO JURISDICTION

1015

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1959

No. ~~1015~~ 155

MICHIGAN NATIONAL BANK, a banking association organized under the laws of the United States,

Appellant,

NATIONAL BANK OF WYANDOTTE, THE FIRST NATIONAL BANK (THREE RIVERS, MICHIGAN), COMMERCIAL NATIONAL BANK OF IRON MOUNTAIN, THE NATIONAL BANK OF JACKSON, and THE FIRST NATIONAL BANK AND TRUST COMPANY OF KALAMAZOO, banking associations organized under the laws of the United States,

Intervening Plaintiffs,

vs.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN, and LOUIS M. NIMS, STATE COMMISSIONER OF REVENUE,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

Thomas G. Long
Victor W. Klein
Philip T. Van Zile, II
Harold A. Ruemenapp
1881 First National Building
Detroit 26, Michigan
Attorneys for Appellant
Michigan National Bank

INDEX

TABLE OF CASES CITED

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1959

No._____

MICHIGAN NATIONAL BANK, a banking association organized under the laws of the United States,

Appellant,

NATIONAL BANK OF WYANDOTTE, THE FIRST NATIONAL BANK (THREE RIVERS, MICHIGAN), COMMERCIAL NATIONAL BANK OF IRON MOUNTAIN, THE NATIONAL BANK OF JACKSON, and THE FIRST NATIONAL BANK AND TRUST COMPANY OF KALAMAZOO, banking associations organized under the laws of the United States,

Intervening Plaintiffs,

vs.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN, and LOUIS M. NIMS, STATE COMMISSIONER OF REVENUE,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT AS TO JUDISDICTION

Appellant, Michigan National Bank, a banking association organized under the laws of the United States, appealed from the judgment of the Supreme Court of the State of Michigan entered on February 25, 1960, affirming a judgment for appellees by the Court of Claims for the State of Michigan and

submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Court of Claims of the State of Michigan is not reported. A copy is attached hereto as Appendix A. The opinion of the Supreme Court of the State of Michigan is reported in 358 Mich. 611; 101 N W 2d 245. A copy is attached hereto as Appendix B. A copy of the judgment entered by the Supreme Court of Michigan is attached hereto as Appendix C.

JURISDICTION

This suit was brought by appellant bank to recover 1952 taxes paid under protest which were assessed on national bank shares pursuant to a statute of the State of Michigan (Act 9 of the Public Acts of Michigan for 1953). On January 20, 1959, judgment was entered for defendants (appellees herein) by the Michigan Court of Claims which, on appeal, was affirmed and judgment entered on February 25, 1960, by the Supreme Court of the State of Michigan. Notice of Appeal was filed in the latter Court on May 16, 1960. In both Courts, appellant attacked the validity of the statute pursuant to which the taxes were assessed on the ground that it was repugnant to the Revised Statutes of the United States, Section 5219 (12 U.S.C., Section 548). The jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by Title 28 United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *First National Bank* v. *Hartford*, 273 U.S. 548, 550, 71 L. Ed. 767; *Merchants' National Bank* v. *Richmond*,

256 U.S. 635, 637, 65 L. Ed. 1135; *First National Bank* v. *Anderson*, 269 U.S. 341, 346, 70 L. Ed. 295. In each of these cases, as here, a national bank appealed from an adverse state supreme court decision on the ground that the state supreme court erred in sustaining the validity of a state tax on shares of national banks, which appellant asserted was in violation of R. S. 5219.

STATUTES INVOLVED

R.S. 5219

Revised Statutes of the United States 5219 (12 U.S.C., Section 548; 13 Stat. 111, as amended by 15 Stat. 34; 42 Stat. 1499; and 44 Stat. 223), hereinafter referred to as R. S. 5219. The following are the pertinent provisions thereof:

> "The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) **tax said shares*** . . .
>
> (b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

The tax in this case is a tax on national bank shares. Since a tax on shares is "in lieu of the others" (Sec. 1(a)), the text

---

*Emphasis throughout is that of appellant.

of the statute relating to the other three methods of taxation is not here set forth. The full text is set forth herein as Appendix D.

Michigan Tax on National Bank Shares

Act No. 9, Public Acts of Michigan, 1953

Act No. 9 of the Public Acts of Michigan for 1953 (Section 205.132a, C. L. Mich., 1948, 1953 Supp.; M. S. A. 7.556 (2a)), hereinafter referred to as Act 9. The following are the pertinent provisions thereof:

> "For the calendar year 1952 . . . and for each year thereafter, or a portion thereof, there is hereby levied upon each resident or nonresident owner of shares of stock of national banking associations located in this state and banks and trust companies organized under the laws of this state, and there shall be collected from each such owner an annual specific tax on the privilege of ownership of each such share of stock, whether or not it is income producing, equal in the case of a share of common stock to 5½ mills upon each dollar of the capital account of such association, bank or trust company represented by such share, and equal in the case of a share of preferred stock to 5½ mills upon the par value of such share."

The full text of Act 9 is set forth herein as Appendix E.

Michigan Taxes on Savings and Loan Associations and their Shares

C. L. '48, Sec. 205.132; M.S.A. Sec. 7.556(2) requires that federal and state savings and loan associations on behalf of their shareholders pay an intangibles tax of $\frac{1}{25}$ of 1% (⅔ mill) on the paid-in value of their shares. This is the same intangibles tax law which was amended by Act 9, above, in respect to bank shares.

C. L. '48, Sec. 450.304a; M.S.A. Sec. 21.206 requires that state savings and loan associations (but not federal associations) pay an additional ¼ mill on the association's capital and legal reserves.

The total statutory tax picture in Michigan as relates to national bank shares and savings and loan associations is set forth on pages 25-6, infra.

QUESTIONS PRESENTED

Broadly stated, the question is:

1. Is Act 9 of the State of Michigan repugnant to R.S. 5219 because Act 9 taxes national bank shares at a rate 8 (or more) times greater than "other moneyed capital in the hands of individual citizens" consisting of shares in state and federal savings and loan associations, which, privately managed and operated for profit, are in direct competition with a substantial phase of the national banking business, to wit, the business of making residential mortgage loans to the public in the same localities, and such moneyed capital is more than 3 times as large as the total capitalization of all national banks in Michigan?

More particularly, with reference to the Michigan Supreme Court's opinion, the questions are:

2. Are savings and loan associations in Michigan which employ large amounts of moneyed capital in direct competition with a substantial phase of the business of national banks, precluded from "coming into competition with the business of national banks" under R. S. 5219, merely because their "character, purpose and organization" are different from national banks and by statute they may not do "a banking business," or "accept deposits"?

3. Under R. S. 5219, is it proper to ignore the fact that Act 9 is a tax upon national bank shares (assets of the bank less liabilities)—at a rate 8 (or more) times greater than is assessed upon other competing moneyed capital—and instead to substitute a different test of discrimination, to wit, comparing the ratio of tax dollars paid to total assets of the respective institutions, without deducting liabilities, thus treating the tax as though it were upon assets of national banks, which is not authorized under R. S. 5219?

4. Notwithstanding that R. S. 5219 was enacted "to prevent the fostering of unequal competition with the business of national banks by the aid of discriminatory taxation," may a state, under a claimed doctrine of "partial exemption," nevertheless discriminate against shares of national banks in favor of other moneyed capital invested by the general public, for profit, in shares of savings and loan associations, when such associations, privately managed and operating for profit, employ such moneyed capital (three times the capitalization of all national banks in Michigan) in direct competition with a substantial phase of the business of national banks?

STATEMENT OF THE CASE

The Michigan Supreme Court recognized (358 Mich. 611, 614):

> "In 1953 (PA 1953, No. 9) the [Michigan] legislature amended the intangibles tax law so as to **place** both State and **national banks** in a **special and more heavily taxed category,** imposing a **tax on bank shares** at the rate of 5½ mills ($5.50 per $1,000) 'on the privilege of ownership of each * * * share of stock' based on the 'capital account' of each bank."

In singling out bank shares, the legislature left untouched the much lower rate of tax ($.65 or less per $1,000) imposed

on savings and loan associations and their shareholders, notwithstanding the undisputed fact that these associations represented large and increasing aggregations of moneyed capital (presently in excess of one and one-half billion dollars) invested by the general public for profit and employed in direct and keen competition with a substantial phase of the national banking business in Michigan, i.e., the residential mortgage loan business.

Appellant, Michigan National Bank, has banking offices in the following cities in Michigan: Lansing, Battle Creek, Flint, Grand Rapids, Marshall, Port Huron, and Saginaw, in all of which cities appellant is in sharp competition with savings and loan associations in the residential mortgage business.

Prior to the passage of Act 9, appellant paid without protest for the year 1952 a tax of $18,500 on its shares and $100,318.24 on its deposits. Act 9 imposed an additional tax of $49,929.27 on appellant's shares, which amount appellant paid under protest on behalf of its shareholders, and for which amount appellant commenced this suit.[1] The grounds of the protest (Exhibit 1, 920a), and the Petition and Statement of Claim (7a-15a) both allege the federal question here involved, i.e., that Act 9 is violative of R. S. 5219. This federal question was also raised at the trial, See Trial Court opinion (Appendix A, infra, p. 2b).

---

[1]Appellant has commenced like actions to recover taxes paid under protest for subsequent years and has claims (1953-1959) in the aggregate amount of $729,509.71.

Other national banks in Michigan intervened, namely: Commercial National Bank at Iron Mountain; National Bank of Jackson; First National Bank and Trust Company of Kalamazoo; First National Bank at Three Rivers; and National Bank of Wyandotte. The intervenors' actions were held in abeyance pending the outcome of this appeal.

The Michigan Supreme Court in its opinion acknowledged (358 Mich. 611, 614):

> "This appeal presents the question of whether CLS 1956, §205.132a (Stat. Ann. 1957, Cum. Supp. §7.556 [2a]) [Act 9], imposing a tax on bank shares, is invalid because it violates section 5219 of the Revised Statutes of the United States (12 USCA, §548)."

The Michigan Supreme Court (358 Mich. 611, 618) stated that:

> "Appellant's position is set forth in its brief as follows:
>
> 'This is not a case of tax avoidance or claimed immunity by appellant. * * * The singularly important and impelling object of this case is to assure tax equality with competitors. The powerful and rapidly growing savings and loan associations (or their shareholders) should be taxed at the same rate as shares in national banks in Michigan, as required under RS §5219—regardless of what that rate may be.' "[2]

SUBSTANTIALITY OF FEDERAL QUESTION

States are prohibited from imposing discriminatory taxes against national banks or their shares.

Absent R. S. 5219, a state is without power to tax national bank shares. "National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property and their shares cannot be taxed under state authority except as Congress consents and then only in conformity with the restrictions attached to its consent." *First National Bank of Guthrie Center* v. *Anderson*, 269 U.S. 341,

---

[2]If savings and loan association shares were taxed at the same rate as shares in national banks in Michigan, the State of Michigan would receive an additional Six Million Dollars or more in revenue annually.

347; 70 L. Ed. 295; *Des Moines National Bank* v. *Fairweather*, 263.U.S. 103, 106; 68 L. Ed. 191; and cases cited.

As relates to a state "tax on shares" of national banks, which is here involved, R. S. 5219, Sec. 1 (b) provides that the tax

> "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks."[3]

The Test Prescribed by R. S. 5219

A state may impose a tax on shares of national banks under Sec. 1(a) of R. S. 5219 only if it conforms with the limitations of Sec. 1(b), thereof. These limitations, as defined by this Court, are that the state tax on national bank shares—

1. "shall not be at a greater rate than is assessed upon other moneyed capital";

2. "coming into competition with [a substantial phase of] the business of national banks"; and

3. such competition is substantial when compared to the capitalization of national banks in the state.

The State of Michigan clearly failed to comply with these requirements in taxing national bank shares under Act 9.

1.

"Other Moneyed Capital"

The money invested for profit, mostly by individuals,[4] in shares of savings and loan associations, and employed by such associations, for profit, in making loans secured by

---

[3]A state tax "on shares" is "in lieu of" the other three methods of state taxation on national banks or their shares permitted under the statute. See R. S. 5219, Sec. 1(a).

[4]However, corporations, partnerships, trusts, etc., also invested in shares of savings and loan associations, for profit.

residential and other real estate mortgages is clearly "other moneyed capital," within the meaning of R. S. 5219. This was conceded by appellee and recognized by the Michigan Supreme Court.

> "The terms of the act of Congress * * * include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money . . . reduced again to money and reinvested."

Mercantile Bank v. New York, 121 U.S. 138, 157; 30 L. Ed. 895.

"Greater Rate"

Act 9 placed bank shares in "a special and more heavily taxed category" (358 Mich. 611, 614) taxing such shares at a "greater rate," 8 or more times the rate imposed on savings and loan associations and their shares. See supra, pp. 4-5; for full discussion, see infra, pp. 25-6.

2.

> "Coming into competition with [a substantial phase of] the business of national banks."

The record in this case proves beyond question the fact of actual and direct competition between national banks and savings and loan associations in Michigan. It shows that both institutions were actively and substantially engaged during the tax year in question, and to date, in seeking and securing in the same localities throughout the State investments of the same class, i.e., residential mortgage loans, and it further appears without question that this business, insofar as national banks and appellant were and are concerned, represented a substantial phase of their business.

(a) In the tax year in question (1952), and to date, both national banks and savings and loan associations were pri-

vately managed financial institutions, operating for a profit in the same localities in Michigan, each making comparable residential mortgage and home improvement loans to the general public.

(b) Appellant national bank held $60,000,000 of residential real estate loans (which amounted to 40% of its total loans and discounts, 20% of its total assets, and from which it derived 26% of its total interest income), $19,000,000 of these loans (2,934 in number) were made by appellant bank during 1952, as compared to $97,000,000 of such loans held by savings and loan associations located in cities where appellant bank operated, $35,000,000 of which loans (6,498 in number) were made during 1952.

(c) All national banks in Michigan held $301,000,000 of such residential real estate loans, which amounted to 30% of their total loans and discounts, as compared to $432,000,000 of such loans held by all savings and loan associations in Michigan.

The Michigan Supreme Court recognized that appellant "introduced proof that the loaning of money on the basis of mortgages secured by residential real estate, was a **substantial phase of its business,**" and the Court summarized such proof (358 Mich. 611, 617).

More compelling than the statistics is (a) the unqualified **admission** by the **managing officers** of the **savings and loan associations** that **appellant national bank** was and is **their principal competitor**[5] in the residential mortgage loan busi-

---

[5]R. 108a-109a, 203a-204a, 259a-260a, 291a, 384a, 439a, 479a, 515a, 576a, 601a-602a, 611a, 619a-620a, 629a, 648a.

ness[6] in the localities where each operated, and (b) similarly, the testimony of officers of appellant bank that the savings and loan associations were its principal competitors for such mortgage loan business. Those who knew best—the actual competitors themselves—recognized that the other was its principal competition in the residential mortgage business.

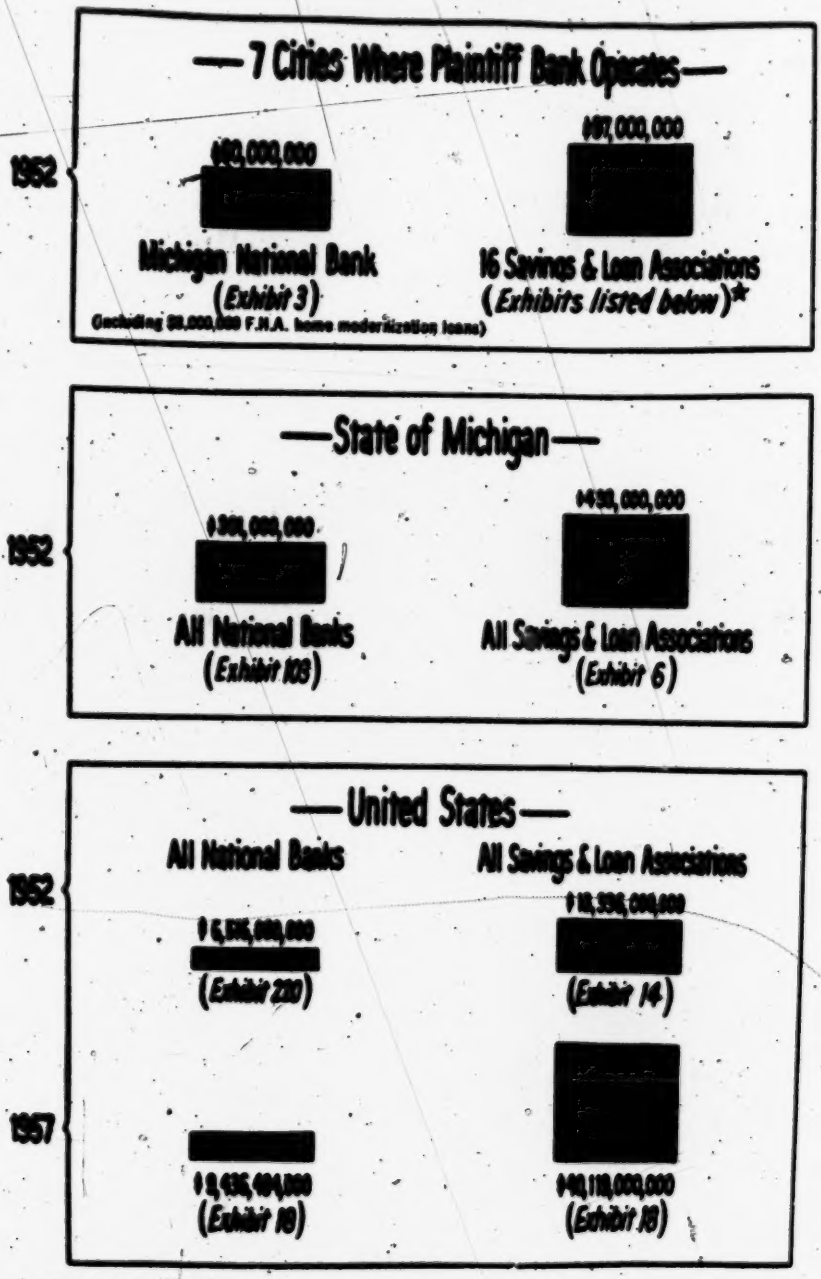
Nationally, all savings and loan associations in 1952 held over 30.2% of the total mortgage debt of $58,500,000,000.

The extent and substantiality of the competition between national banks (including appellant) and savings and loan associations is graphically illustrated by the chart on the following page.

---

[6]Virtually all of the Bank's residential loans involved the exchange of new money for a mortgage, rather than the giving of a mortgage to secure a pre-existing indebtedness (R. 613a, 614a, 619a, 636a, 640a, 647a) and were amortized on a monthly basis (R. 432a, 547a, 566a, 613a, 614a, 617a, 628a, 647a). The other terms and conditions of their real estate loans were substantially identical to those of appellant bank. In each community where appellant did business, both appellant and the savings and loan association or associations there located charged comparable interest rates (R. 219a, 221a, 259a, 289a, 300a, 381a, 430a, 487a, 488a, 511a, 546a-547a, 562a, 564a, 605a, 617a, 618a, 627a, 637a, 646a; Exhibit 72, pp. 30, 57; Exhibit 73, p. 44; Exhibit 77, pp. 20, 33; Exhibit 79, p. 58), made mortgage loans in the same comparable ratio to the value of the property mortgages (R. 566a, 567a, 606a, 607a, 609a, 617a, 618a, 627a, 639a, 646a; Exhibit 63, p. 29; Exhibit 77, p. 39; Exhibit 106, Exhibit 107, Exhibit 108); made mortgage loans substantially comparable as to term of years (R. 488a, 546a, 590a, 606a, 609a, 617a, 618a, 627a, 638a, 639a, 646a; Exhibits 106, 107 and 108); and received mortgages with comparable rights and liabilities (R. 326a).

Residential Mortgage Business



★(Exhibits: 36A, 36C, 36E, 36E, 36G, 36I, 36J, 45F, 57F, 61F, 73E, 77E, 81E, 87, 92.)

The Highest Banking Official of the United States Government, the Comptroller of Currency, fully recognizes the "increasing importance" of savings and loan associations' competition with banks.

Considering the extent of competition faced by banks, the Comptroller of Currency of the United States recently testified before Congress:

> ". . . . banks are finding themselves more and more in competition with other types of bank and nonbank financial institutions. Among the other types of financial institutions competing with commercial banks are . . . Federal and State chartered savings and loan associations . . ."[7]

The Comptroller then placed into the record an address of L. A. Jennings, Deputy Comptroller of Currency, of May 27, 1959, on the subject of "Competition in Commercial Banking," (see also Congressional Record of June 18, 1959) in which the Deputy Comptroller, among other things, stated:

> "Federal and State-chartered savings and loan associations are zealous and highly effective competitors for the funds of savers and for real estate mortgage loans . . .
>
> " . . . they maintain fully invested positions in real estate mortgage loans . . ."

The Comptroller concluded:

> "It is our view that any failure to take into consideration competition from other types of financial institutions when considering the subject of bank competition would indicate serious lack of knowledge of basic factors important to banking today and disregard of the elements that go into a determination of the competitive situation in which commercial banks function."

---

[7]Hearings before Subcommittee No. 2 of the Committee on Banking and Currency, House of Representatives, Eighty-Sixth Congress, Second Session, on S. 1062—February 16, 17, and 18, 1960, p. 7.

3.

The competing moneyed capital of savings and loan associations is "substantial" when compared with the capitalization of national banks."

This third element of the test under R. S. 5219 has been held by this Court to be implicit in the statute.

> ". . . §5219 is violated wherever capital, substantial in amount **when compared with the capitalization of national banks**, is employed either in a business or by private investors in the same sort of transactions as those in which national banks engage and in the same locality in which they do business." *First National Bank of Hartford* v. *City of Hartford*, 273 U.S. 548, 558; 71 L. Ed. 767.

It is undisputed that other moneyed capital invested in all savings and loan associations in Michigan in 1952 (in excess of $468,000,000) (Ex. 221) was approximately three times the total capitalization of all national banks in Michigan ($166,724,000) (Ex. 103), and such other moneyed capital in associations located in the cities where appellant operated ($134,438,000) (Ex. 209) was approximately ten times the capitalization of appellant bank ($13,038,000) (Ex. 3).

Nationally, in 1952, the moneyed capital represented by shares in savings and loan associations amounted to $20,853,000,000 (Ex. 224) as compared with $7,059,000,000 (Ex. 224), the capitalization of all national banks.

UNDER THE CONTROLLING DECISIONS OF THIS COURT, ACT 9 IS INVALID AND IN CONFLICT WITH R. S. 5219.

Where, as here, substantial amounts of moneyed capital are invested in and employed by savings and loan associations in direct competition with a substantial phase of the business of appellant and other national banks, to-wit: the business of making loans on residences and other real estate

in the same localities, the case, we submit, is wholly concluded by the following decisions of this Court, next discussed.

First National Bank v. *Hartford*, 273 U.S. 548; 71 L. ed. 767, went into so many features of the matter both of law and of fact that a rather lengthy discussion of the case seems imperative. The suit was to recover the tax on a national bank's shares for the year 1921. This Court found that it was apparent that the ad valorem tax imposed upon national bank shares was at a greater rate than the income tax imposed upon credits and intangibles, but the Court further held:

"... it is not sufficient to show this discrimination alone." (552)

The Court carefully pointed out that:

> "The validity of the tax complained of depends upon whether or not the moneyed capital in the state thus favored is employed in such a manner as to bring it into substantial competition with the business of national banks." (552)

This was the question discussed and decided in the case. The Court concluded in *Hartford* that:

> "Competition may exist between other moneyed capital ... within the purpose of §5219, even though the competition be with **some** but **not all phases** of the business of national banks. Section 5219 is not directed merely at discriminatory taxation which favors a competing banking business. (557)
>
> "... Our conclusion is that §5219 is violated **wherever** capital, substantial in amount when compared with the capitalization of national banks, is employed either in a business or by private investors in the same sort of transactions as those in which national banks engage and in the same locality in which they do business." (558)

The nature of the evidence considered by this Court in reaching this conclusion was as follows:

> "The evidence shows that plaintiff in the course of its business receives deposits, loans money, has a savings department, deals in exchange, buys and sells notes, government and other bonds, discounts commercial paper and acquires real estate mortgages by loan and purchase . . .
>
> "There are real estate firms engaged in lending money to individuals in the vicinity of plaintiff's banking house, the amount thus loaned amounting annually from $250,000 to $300,000. * * * And similar conditions obtain throughout the state. There are various individuals, copartnerships and corporations in the vicinity engaged in the business of acquiring and selling notes, bonds, mortgages and securities. Substantial capital is employed in their business." (553).
>
> "* * * it affirmatively appears from the evidence, that there are individuals, firms and corporations in Wisconsin, not required by its laws to be incorporated as banks, engaged in the business of loaning money on the security of notes, bonds, and mortgages, and buying and selling securities, all involving investment and reinvestment by them and their customers. Through the activities of these business concerns, large investments are made and remade in such securities. Large amounts of capital are thus employed in some of the ordinary banking activities although these individuals and firms do not receive deposits . . ." (555)

The Wisconsin Court there, like the Michigan Court here, denied recovery construing the decisions of this Court "as requiring equality in taxation only of moneyed capital invested in businesses substantially identical with the business carried on by national banks." (555)

This Court, rejecting that construction of R. S. 5219, said:

"Under this [the Wisconsin Court's] view, if logically pursued, capital invested in businesses engaged in **some but not all of the activities of national banks** * * * could not be considered in determining the question of competition . . ." (556).

"The **restriction applies** as well **where the competition exists only** with respect **to particular features of the business of national banks** or where moneyed capital 'is employed, substantially as in the loan and investment features of banking, in making investments by way of loan, discount or otherwise, in notes, bonds or other securities, with a view to sale or repayment and reinvestment' . . . " (556).

"Here, large amounts of capital are shown to be invested in businesses carried on throughout the state which are of the same character as some though not all of the business carried on by national banks. In two fields at least, loans and sales of credits, capital thus employed is shown to be in substantial competition with that of national banks . . ." (558-9).

"It is enough as stated if both engage in seeking and securing in the same locality capital investments of the class now under consideration which are **substantial in amount** . . . " (559).

"plaintiff is shown to have investments in real estate mortgages and to be engaged in selling them . . . To that extent the business of acquiring and selling such mortgages and evidences of debt, carried on by numerous individuals, firms, and corporations in Wisconsin, comes into competition with this incidental business of national banks" (560).

Most pertinent are statements in *Hartford* at p. 557, lines 25-34; and p. 558, lines 2-21, quoted infra, pp. 22-3, holding that **"manner of employment"** of other moneyed capital and **"not . . . character of the business"** determine the question of competition with national banks under R. S. 5219.

To the same effect, and decided on the same day as *Hartford,* is *Minnesota* v. *First National Bank,* 273 U.S. 561; 71 L. Ed. 774, in which this Court said:

> ". . . the competition guarded against by §5219 . . . may arise from the **employment of capital** invested by institutions or individuals **in particular operations or investments** like those of national banks." (567).

First National Bank v. *Anderson,* 269 U.S. 341; 70 L. Ed. 295, reversed a judgment of the Iowa Supreme Court, which had dismissed the bank's petition. The case stated in the petition is summarized at page 351:

> "Some of these [allegations] are directly to the effect that the tax on the shares was computed at the rate of one hundred and forty-three and five-tenths mills on the dollar, while that on notes, mortgages and other evidences of indebtedness, 'such as normally enter into the business of banking' and representing moneyed capital of individual citizens 'engaged in competition' with the bank, was computed at five mills on the dollar" (351).

The amount taxable at five mills was alleged to be approximately $5,000,000. This Court, holding that the state tax violated R. S. 5219, reviewed the earlier decisions and summarized the same in four numbered paragraphs, pages 347 and 348, holding that:

> ". . . every clear discrimination against national bank shares and in favor of a relatively material part of other moneyed capital employed in substantial competition with national banks is a violation of both the letter and spirit of the restriction . . ." (348).

The addition to R. S. §5219 by the Act of 1923 of the words "coming into competition with the business of national banks," etc. were discussed and it was said:

> "* * * the reenactment did no more than to put into express words that which, according to repeated decisions of this Court, was implied before" (350).

In *Merchant's Nat'l Bank* v. *Richmond*, 256 U.S. 635; 65 L. Ed. 1135, the City of Richmond (Va.) assessed national bank shares for the year 1915 at $8,000,000, state banks and trust companies at $6,000,000 and "bonds, notes and other evidences of indebtedness" at $6,250,000. The latter were taxed at a lower rate than the bank shares. The Virginia Court held that, there being no difference in the tax rate on state and national bank shares, the lower rate on the other class was immaterial. This court said:

> "* * * It is to be inferred that a substantial part of this aggregate was in the hands of individual taxpayers; the precise amount does not appear. It also was shown by evidence without dispute that moneyed capital in the hands of individuals invested in bonds, notes, and other evidences of indebtedness comes into competition with the national banks in the loan market." (638).

The Court then reviewed and restated the rulings as to what is meant by moneyed capital, page 639, second paragraph, and 641 beginning with line 7. The essence of the decision is:

> ". . . while the words 'moneyed capital in the hands of individual citizens' do not include shares of stock in corporations that do not enter into competition with the national banks, they do include something besides shares in banking corporations and others that enter into direct competition with those banks. They include not only moneys invested in private banking, properly so called, but investments of individuals in securities that represent money at interest and other evidences of indebtedness such as normally enter into the business of banking." (639)

The Richmond tax was held by this court to be in violation of R. S. 5219 and the judgment of the Virginia Supreme Court was reversed.

To the same effect see *Public National Bank of New York* v. *Keating, et al.* (CCA 2, 1931), 47 F. 2d 561; affirmed Per Curiam, *Keating* v. *Public National Bank*, 284 U.S. 587; 76 L. Ed. 507. The rules of *Hartford* and *Minnesota* were well summarized—insofar as is here applicable—by the Second Circuit Court of Appeals, 47 F. 2d 561, 564.

THE DECISION OF THE MICHIGAN SUPREME COURT IS IN DIRECT CONFLICT WITH THE CONTROLLING DECISIONS OF THIS COURT AND WOULD NULLIFY R. S. 5219 AND MAKE IT INOPERATIVE.

The Michigan Supreme Court made three basic errors in its decision.

1.

The Michigan Supreme Court erred in holding that as a matter of law savings and loan associations cannot be in competition with the business of national banks because they are "different in character, purpose and organization from national banks" and operate "in a narrow, restricted field."

The Michigan Supreme Court quoted (358 Mich. 611, 618) and considered:

> "Defendants summarize their position as follows:
>
> 'In the last analysis, savings and loan associations cannot be in "'substantial competition with the business of national banks" because they cannot and do not engage sufficiently in the activities characteristically carried on by the national banks. Stated another way, if they are not comparable institutions in substance, how can they be in substantial competition?' "

Notwithstanding the proven fact of competition by savings and loan associations with a substantial phase of the business of appellant and other national banks in the state, the Michigan Court concluded (639) that:

> "Michigan building and loan associations operated in a narrow, restricted field, are markedly different in character, purpose and organization from national banks, and are not in 'substantial competition' with national banks."

The Michigan Court's conclusion followed the above quoted summary of appellees' position based on their contention that banks receive deposits and engage in all activities of the banking business, of which the loan of moneys on residential mortgages is but one phase [even though over 40% of appellant's total loans]; whereas, savings and loan associations are not permitted to "accept deposits" or to "do a banking business," and their business is limited "solely in the narrow activity of making first mortgage loans secured by residential properties . . ." (618).

The same argument was made and followed by the Wisconsin Supreme Court in *Hartford*, but was explicitly rejected by this Court (273 U.S. 548; 71 L. Ed. 767). This Court recognized that:

> "Large amounts of capital are thus employed in some of the ordinary banking activities although these individuals and firms **do not receive deposits.**" (555),

but, nevertheless, held:

> " . . . this Court has recently had occasion, in reviewing the earlier decisions dealing with this subject, to point out that the requirement of approximate equality in taxation is **not limited to** investment of moneyed capital in shares of **state banks or** to competing capital employed in **private banking. The restriction applies as well where the competition exists only with respect to particular features of the business of national banks . . .** (556)

> "Competition may exist between other moneyed capital and capital invested in national banks, serious in character and therefore well within the purpose of §5219, even though the competition be with some but not all phases of the business of national banks . . . Competition in the sense intended arises **not from the character of the**

business of those who compete but from the manner of the employment of the capital at their command . . . (557)

". . . With the great increase in investments by individuals and the **growth of concerns engaged in particular phases of banking** shown by the evidence in this case and in *Minnesota* v. *First National Bank of St. Paul* . . . [273 U.S. 561,567], discrimination with respect to capital thus used could readily be carried to a point where the business of national banks would be seriously curtailed. Our conclusion is that §5219 is violated wherever capital, substantial in amount when compared with the capitalization of national banks, is employed either in a business or by private investors in the same sort of transactions as those in which national banks engage and in the same locality in which they do business." (558).

To the contrary, the Michigan Supreme Court concluded that because the savings and loan associations were not banks of deposit, R. S. 5219 was not violated, saying (358 Mich. 611, 635):

"The fundamental difference between a bank making loans from deposits and loans made otherwise, was recognized in *First National Bank of Shreveport* v. *Louisiana Tax Commission* (1933), 289 U.S. 60; 77 L. Ed. 1030."

In *Shreveport* this "difference" was relied upon solely to show an "ample basis for classification" to meet one challenge of the bank, that the equal protection clause of the Fourteenth Amendment had been violated (64). This difference in character or source of the moneyed capital, however, was not considered by this Court as a defense to the other challenge of the bank, that R. S. 5219 had been violated. The Court held that "fact" of competition was the controlling test. In *Shreveport* the record clearly showed that "there was no competition with the national banks on the part of any concern lending money on mortgages of real estate; because national banks will never handle such loans" (66) and, therefore, R. S. 5219 was not violated; whereas the record in the case at bar clearly proves competition and violation of R. S. 5219.

If the reasoning of the Michigan Supreme Court is carried to its logical conclusion, it would mean that R. S. 5219 would apply solely to state banks, the only institutions which are substantially identical to national banks and are similar in "character, purpose, and organization" to national banks. To so confine R. S. 5219 would be contrary to *Merchant's National Bank v. Richmond,* supra, and also to the 1923 amendment to R. S. 5219 as it has been consistently construed by *Hartford* and other post-1923 cases. It would, in fact, restrict R. S. 5219 in a manner which Congress has consistently refused to do, despite repeated proposals.[8]

Clearly, therefore, under *Hartford* and *Minnesota,* a state may not exempt or prefer savings and loan associations as a matter of law because they are engaged in some but not all of a national bank's activities, or because they operate in a so-called "narrow, restricted field," or have a different character and purpose, when the proven facts are that:

1. Residential mortgage loans amounted to 40% of appellant bank's total loans, 26% of its income and 20% of its total assets.

2. All national banks in Michigan held $301,462,000 of residential loans amounting to 30% of their total loans and discounts.

3. The moneyed capital employed by such associations is three times the capitalization of all national banks in Michigan.

---

[8]Proposals to limit state taxes on national bank shares to that imposed on shares of state banks—thus permitting other competing moneyed capital to be taxed at lower rates by the states—have been rejected by Congress since 1923. Hearings before Senate Banking and Currency Committee, on S. 1573, 70th Cong., 1st sess. (1928), pp. 2, 476. Hearings on H. R. 8727 before the House Committee on Banking and Currency, 70th Cong., 1st sess., 1928, pp. 1, 1124 (after *Hartford*); S. 3009, 1934 Congressional Record, 73rd Cong., 1st sess., p. 4041; H.R. 9045, 1934, Ibid., pp. 6375, 10294 (after *Shreveport*).

2.

The Michigan Supreme Court erred in substituting a different test of discrimination than that prescribed by R. S. 5219 for a tax on shares.

Act 9 is a tax on shares of national banks. Under R. S. 5219, Sec. 1 (a), such a tax is in lieu of the other three methods permitted to a state taxing national banks or their shares. Sec. 1 (b) specifically provides the test and standard of tax equality and enjoins the state as follows:

> "Sec. 1 (b) In the case of a **tax on said shares** the tax imposed shall **not** be **at a greater rate** than is assessed upon other moneyed capital [shares in savings and loan associations] in the hands of individual citizens of such State coming into competition with the business of national banks..."

Under Act 9, the State of Michigan imposed a tax on shares of national banks at the rate of $5.50 per $1,000, based on their capital accounts (capital, plus surplus and undivided profits).[9] In comparison, the State taxed shares of savings and loan associations at the rate of $.40 per $1,000 of paid-in capital (excluding surplus, undivided profits and reserves).[10] In addition, state savings and loan associations—but not federal—were subject to an annual privilege tax of $.25 per $1,000 of capital and legal reserves (excluding surplus and undivided profits).[11] Both banks and savings and loan associations were subject to ad valorem real property taxes at

---

[9]C. L. '48, Sec. 205.132a (1953 Supp.); M.S.A. 7.556 (2a).

[10]C. L. '48, Sec. 205.132; M.S.A. Sec. 7.556.

[11]C. L. '48, Sec. 450.304a, M.S.A. Sec. 21.206.

The associations get their right to do business from the state and the state levies a tax "upon the privilege of exercising corporate franchises." M.S.A. 21.205 as amended by Act 183 of 1952. Plaintiff Bank obtains its "privilege of exercising corporate franchises" from the U.S. and the State has no basis for charge therefor. Therefore, the amount of the franchise taxes should not even be included in determining the comparative tax rates on shares of the respective institutions.

the same rate. The only other state taxes imposed upon a few —but not all—savings and loan associations, and not imposed upon banks, are inconsequential.[12] See Ex. 208.

Clearly, therefore, Act 9 imposes a tax on shares of national banks at a rate more than 8 times greater than the tax on domestic savings and loan association shares ($5.50 per thousand compared to 65 cents per thousand), and more than 13 times greater than the tax on federal savings and loan association shares ($5.50 per thousand compared to 40 cents per thousand).

Notwithstanding the proven discrimination, the Michigan Court (358 Mich. 611, 633) makes a comparison of the total tax burden (of all kinds of levies) on the total assets—without deducting liabilities—of Michigan National Bank and of savings and loan associations and finds the same .089 for associations and .091 for the Bank and also finds that the

---

[12]The following taxes are called to the Court's attention solely for the purpose of completeness:

Savings and loan associations were subject to a tangible personal property tax (C. L. '48, Sec. 211.8, et seq.; M.S.A. Sec. 7.8, et seq.) to which national banks were not subject. However, the tax paid, if any, was insignificant. (Six of the associations located where appellant operates paid no personal property tax. The largest amount paid by any such association was less than $500.00.)

Sec. 3 of Act 183, P.A. 1952 (C. L. '48, Sec. 450.303; M.S.A. 21.203) imposed a franchise tax on domestic savings and loan associations of 1/10 mill upon their authorized capital. However, this tax is paid only at the time the articles of incorporation are filed or upon an increase in authorized capital stock. It is not an annual tax. During the year 1952, only one association doing business in a city in which plaintiff bank operated (East Lansing Savings and Loan Association) paid such a tax ($600.00).

Section 2 of the Intangibles Tax (Act 301 of the Public Acts of 1939, as amended) levied a tax at the rate of 1/25 of 1% on bank deposits as of December 31, 1952. The tax paid by appellant bank pursuant to this statute for the year 1952 was $100,318.24 (Exhibit 1).

Intangibles Tax in relation to total assets is .02243 for associations and .02459 for the Bank. This comparison is not proper nor permitted by R. S. 5219.

The tax imposed by Act 9 is "on said shares"—which this Court has held to mean assets after deducting all liabilities—not gross "assets of the bank without deduction of its liabilities," *Minnesota* v. *First National Bank*, 273 U.S. 561, 564; 71 L. Ed. 774; *Des Moines National Bank* v. *Fairweather*, 263 U.S. 103; 68 L. Ed. 191. As this Court said in Minnesota (p. 564):

> "... it is urged, if bank shares were taxed at the same rate without deducting the bank's liabilities in ascertaining the value of their shares, the amount of the tax would be approximately the same. This argument ignores the fact that the tax authorized by §5219 is against the holders of the bank shares and is measured by the value of the shares, and not by the assets of the bank without deduction of its liabilities, *Des Moines Nat. Bank* v. *Fairweather*, 263 U.S. 103, (68 L. Ed. 191, 44 Sup. Ct. Rep. 23) and that the bank share tax must be compared with the tax assessed on competing moneyed capital of individuals invested in credits, or the tax on capital invested by individuals in the shares of corporations whose business competes with that of national banks ... (cases cited)."

The state can levy taxes in respect of national banks only in such manner and to such extent as permitted by act of Congress. Congress has not permitted and the state cannot levy a tax on total assets. The state cannot levy a tax on assets at all other than real estate. The state now comes along and says: "See how we have gotten around not being permitted to levy a tax on assets. We have levied a tax on bank shares which carries the same aggregate burden as a tax on total assets." As Congress has not permitted a tax on total assets, the use of total assets as a basis for comparison cannot be proper.

The Michigan Supreme Court, in considering Act 9, a tax on shares, has used a basis for comparison explicitly rejected by this Court.

Nor do the cases of this Court cited by the Michigan Supreme Court (358 Mich. 632), support a comparison of tax burden to assets (without deducting liabilities) explicitly prohibited by *Minnesota* and *Fairweather*. They merely stand for the proposition that where different methods of valuation are used, a difference in rate may not necessarily be discriminatory in a state tax on shares (cf. *People* v. *Weaver*, 100 U.S. 539; 25 L. Ed. 705); or, where a different method of taxation is used, if, when translated into the method employed in taxing national banks or its shares, there is approximate equality, discrimination under R. S. 5219 does not necessarily obtain (*Tradesmens National Bank of Oklahoma City* v. *Oklahoma Tax Commission*, 309 U.S. 560; 84 L. Ed. 947; *Covington* v. *First National Bank of Covington*, 198 U.S. 100; 49 L. Ed. 963).

3.

No doctrine of this Court permits a state to discriminate against national bank shares in favor of other moneyed capital employed under private management, for profit, in competition with a substantial phase of the business of national banks.

The remaining basic question is whether or not a state, for reasons of its own—notwithstanding R. S. 5219—may exempt from taxation or prefer

(1) "other moneyed capital" (savings and loan shares);

(2) clearly "coming into competition with [a substantial phase of] the business of national banks," and

(3) "substantial when compared with the capitalization of national banks" in the state.

The lower Court erroneously concluded that the State of Michigan could do so (358 Mich. 611, 620, 639), notwith-

standing that no such exception is expressed in the statute, and that such a "partial exemption," if recognized, would defeat the purpose of the statute, i.e. the avoidance of discrimination against national bank shares in favor of huge amounts of other moneyed capital locally employed in competition with national banks.

The State asserts and the Michigan Court affirms the assertion that the difference between the rate of tax on national bank shares and shares of savings and loan associations in Michigan is a "partial exemption" of the latter, and hence justified. To indulge in semantics should not get one anywhere, and that is what the State does here. **A difference in rate is a discrimination.** Under the facts of this case, we submit, a state has no power to discriminate against national banks or their shares under a so-called doctrine of "partial exemption."

In reaching its conclusion that Michigan may exempt or prefer savings and loan associations or their shares, the Michigan Court relied upon eight cases of this Court, all decided prior to 1900, and two lower court cases:

(a) Three of these cases[13] involved the exemption of property—**not "moneyed capital,"** as that term has been defined since *Mercantile*, supra, pp. 9, 10—and therefore **not in competition** with the business of national banks;

(b) Three of these cases,[14] including *Mercantile*, involved mutual savings banks which (i) were **not found in competition** with the **then** business of national banks;

---

[13] *Hepburn* v. *School Directors*, 23 Wall (90 U.S.) 480, 485; 23 L. Ed. 112; *Adams* v. *Nashville*, 95 U.S. 19, 22; 24 L. Ed. 369; *Boyer* v. *Boyer*, 113 U.S. 689, 693; 28 L. Ed. 1089.

[14] *Mercantile Bank* v. *New York*, 121 U.S. 138; 30 L. Ed. 895; *Davenport Bank* v. *Davenport Board of Equalization*, 123 U.S. 83, 86; 31 L. Ed. 94; *Bank of Redemption* v. *Boston*, 125 U.S. 60; 31 L. Ed. 689.

(ii) were **publicly managed** for public or quasi-charitable purposes; and (iii) were **not privately operated**, in "a commercial sense," **for profit;**

(c) Two of these cases[15] are clearly not in point as they in no way involved the question presented by this appeal, except by way of dicta in reviewing prior cases (mentioned and distinguished under (a) and (b) above);

(d) The two lower federal court cases,[16] *Hubbard* and *Hoenig,* involved savings and loan associations which were **not in competition** with the **then** business of national banks.

These cases, we submit, are inapposite.

The first three cases, as stated, involved property not "moneyed capital" as presently defined. When these cases were decided (1874-1885), the term "moneyed capital" was construed to include every type of intangible personal property and this Court, with that sweeping a definition in mind, simply affirmed the states' right to totally, not partially, exempt from taxation some property, such as municipal bonds, homesteads, the property of clergymen and the like—which was not in competition with the business of national banks. Competition was not then a factor and was not considered.

The next three cases decided in 1887 and 1888, involved, amongst other things, mutual savings banks. *Mercantile* introduced the present concept of "moneyed capital" and

---

[15] *Aberdeen Bank* v. *Chehalis County,* 166 U.S. 440, 460, 461; 41 L. Ed. 1069; *First National Bank of Wellington* v. *Chapman,* 173 U.S. 205, 214; 43 L. Ed. 669.

[16] *Mercantile National Bank of Cleveland* v. *Hubbard* (ND Ohio) 98 F 465, 471; *Hoenig* v. *Huntington National Bank of Columbus,* (CCA 6) 59 F 2d 479, 482, certiorari denied 287 U.S. 648; 77 L. Ed. 560.

was the first to consider "competition" as a factor. As to deposits in savings banks, this Court held such moneyed capital could be totally exempt without violating R. S. 5219 because:

> "No one can suppose for a moment that savings banks come into any possible competition with national banks . . ." (121 U.S. 161).

That this is not so today, see infra., p. 33, et seq.

Davenport held only that there was no discrimination between the tax imposed upon national bank shares and on savings banks in Iowa.

In *Bank of Redemption* (1888), decided one year after *Mercantile,* it was, however, urged by plaintiff bank that ". . . Massachusetts Savings Banks are permitted to transact a banking business in the way of loans upon personal securities,[17] which assimilate them more closely to national banks" (125 U.S. 68) than to the savings banks involved in *Mercantile.* Without making any finding as to whether these investments were legally available to—or employed by—national banks, the Court summarily dismissed the point, saying (125 U.S. 68):

> "But the difference mentioned, **if it exists at all,** is immaterial; the **main purpose and chief object** of savings banks, as organized under the laws of Massachusetts, are the same as those in New York, as considered in the case of the *Mercantile Bank.* They are substantially institutions, under **public management,** in pursuance of a

---

[17] This was one of the 8 classes of investments open to Massachusetts savings banks. It was, however, to be employed only "if the deposits cannot be conveniently invested in the modes heretofore named." These investments were moreover limited to not more than ⅓ of the deposits in such banks, and required two sureties on such loans.

> great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and **not** as banking institutions **in the commercial sense** of that phrase."

The Wisconsin Court in *Hartford,* 187 Wis. 290, 203 N.W. 721, 727-9, (like the Michigan Court in the instant case), expressly relied upon the foregoing language from *Bank of Redemption,* supra, (as well as the so-called partial exemption cases relied upon by the Michigan Court in the case at bar) (203 N.W. 727-9), and the Wisconsin Court concluded that the "object" and "purpose" of building and loan associations, as well as other moneyed capital—regardless of manner of employment of capital—was the test of "competition" within the meaning of R. S. 5219. This partial exemption argument was also urged by the State in its brief before the Supreme Court in *Hartford* (pp. 37-42). Nevertheless, this Court reversed the Wisconsin Supreme Court's decision and specifically stated (273 U.S. 557):

> "**Competition** in the sense intended arises **not from the character of business** of those who compete **but from the manner of the employment of the capital** at their command."

To the extent, if any, that *Bank of Redemption,* supra, is contrary to this test, it is necessarily overruled by later decisions, particularly *Hartford.*

There is another important distinction between the early savings bank cases and the instant case involving present-day savings and loan associations. An institution managed and operated by **"public trustees"**[18] solely to conserve the savings

---

[18]The character of the early savings banks is described by this Court in *Bank of Redemption* v. *Boston,* 125 US 60, in which the Court said:

> "The institutions themselves, although corporations, have no capital stock and are **managed by trustees, not selected by the depositors, but by public authority."** (66)

of poor people can hardly be said to be using its moneyed capital in competition with national banks. As the Court recognized in *Bank of Redemption*, they were not "banking institutions in the **commercial sense** of that phrase" (68).

This Court in the early cases equated "deposits in savings banks"—publicly managed and operated to conserve funds of poor people, not for profit in the "commercial sense"—with "moneys belonging to charitable institutions." See *Aberdeen Bank* v. *Chehalis County*, 166 U.S. 440, 460-1; *First National Bank of Wellington* v. *Chapman*, 173 U.S. 205, 214.

Change in the manner of doing business by savings and loan associations and national banks since 1900 makes the early cases inapplicable.

In *Hartford*, this Court stated:

> "Some of the cases dealing with the technical significance of the term competition in this field were decided **before** national banks were permitted to invest in mortgages as they **now** are. Act of December 23, 1913, c. 6, §24, 38 Stat. 251, 273; Act of September 7, 1916, c. 461, 39 Stat. 752, 754; Act of February 25, 1927, §24. And others go no further than to hold that in the absence of allegation and proof of competition with national banking capital, it cannot be said that an offending discrimination exists" (273 U.S. 558).

National banks did not have authority to make mortgage loans generally until the Act of September 7, 1916, and then the authority was very restricted. The restriction was substantially removed by the Act of August 23, 1935, Act of June 27, 1934, authorizing the making of F.H.A. mortgages, and Comptroller General's decision of 1944 authorizing the

making of V.A. (or G.I.) home loans. The first express mention by Congress of a national bank's right to accept "savings deposits" was in the Federal Reserve Act of 1913.[19]

It necessarily follows that cases involving the making by state institutions or others of mortgage loans or of accepting and investing savings deposits at a time when national banks did not have authority or were not exercising authority to do either are inapplicable to present day conditions.

The savings banks and building and loan associations of 1900 and earlier years were peculiar and unique quasi-charitable institutions, employing their moneyed capital exclusively for the sole benefit of "poor people" to aid them in "accumulating small savings" and/or in "building small houses." Each served a unique function not open to the national banks of their day.[20]

---

[19]Such extensions of power have not been attacked except in *Franklin National Bank v. N. Y.*, 347 U.S. 373; 98 L. Ed. 767, where this Court said:

> "That these federal institutions may be at no disadvantage in competition with state-created institutions, the Federal Government has frequently expanded their functions and authority." (375)

[20]Savings banks were designed solely for persons of modest means, primarily the working classes: mariners, tradesmen, clerks, mechanics, servants and others. Until the advent of these banks of deposit, which operated under public management, there was no place where wage-earners could safely put aside some of their earnings for future needs. Prior to 1900, there was no savings feature in life insurance policies. Postal savings were not adopted until 1910, and **national banks could not accept savings deposits until 1913.** Investments by savings banks were strictly defined by statute. Usually they were permitted to invest in government securities of various types and in **real estate mortgages,** primarily on residential properties, **neither of which were in competition with national banks as they were then operated.** [Lintner, Mutual Savings Banks in the Savings and Mortgage Markets,

Judge Taft described the early building and loan associations in *Mercantile Nat. Bank* v. *Hubbard,* 98 F. 465, 471 as follows:

> " * * * It seems to me that building associations are certainly not to be differentiated in their purpose or object, or practical effect, from savings banks, and that the capital invested in them, though subject to a somewhat different rule of taxation, cannot be regarded as moneyed capital in competition with the moneyed capi-

---

(Harvard University, 1948), Chp. II; The Miracle of Mutual Savings, 1834-1934 (Bowery Savings Bank); Mutual Savings Banking (National Ass'n of Mutual Savings Banks, 1953); 4 McKinney's Consolidated Laws of New York, Secs. 230 et seq.]

Similarly, savings and loan associations of 1900 carried out a unique function by enabling "poor people" to set aside small savings to buy small homes. The **loaning of money on the security of residential real estate,** the sole object of the associations, was **not then permitted by national banks.** There was no distinction between the savings and borrowing members, both shared equally in the gains or losses of the associations. Both were required to make payments on the installment basis payable periodically in small amounts. Fines could be levied for nonpayment of installments when due. The result was enforced thrift. They were truly mutual in operation. Borrowers had to be subscribers to and investors in the capital stock of the association. The operations of the associations were confined to its members and **not open to the public.** Loans were the subject of competitive bidding restricted to the members at closed meetings. (Act 50 of P.A. of Mich. 1887). The investment in shares by partnerships, mercantile corporations or fiduciaries were in the early days deemed inconsistent with their purpose and prohibited:

> "It certainly does not appear to be consistent with the purposes of a building association's being, nor in any wise related to the policy which justifies the creation of these institutions with the extraordinary powers they possess, to have its membership in part composed of corporations . . . " (Opinion of the Attorney General of Michigan 1903, page 58.)

> tal in national banks, any more than is capital invested in savings banks. The chief object of building associations is to encourage the building of small houses by poor people, and the saving from their earnings, week by week, of an amount sufficient to pay the mortgage debts incurred in the purchase of the land and the construction of the house."

And, in *Hoenig* v. *Huntington National Bank*,[21] 59 F. 2d. 479, after referring to the *Hubbard* case the Court recognized that savings and loan associations were "created in answer to a need which the banks could not and did not satisfy . . . " (482).

The "just cause" or "just reason" language of the pre-1900 cases on which the Supreme Court of Michigan relies had to do with moneyed capital that was not employed in competition with the business of national banks and which was quasi-charitable, quasi-public in nature. Neither of these facts is here present. **Today,** the fact of competition in the employment of moneyed capital by savings and loan associations and national banks is beyond reasonable dispute.

---

[21]In *Hoenig* every banker who there testified was obliged to admit on cross-examination that:

> "We have no direct loans on homes" (Archer);
> "We do not fill that demand" (Huntington);
> "As a rule we do not cater to them" (Stein).

(See *Hoenig* record, pp. 218, 220, 240, 251, 337).

The record in *Hoenig* shows that only 7/10 of 1% of the plaintiff bank's loaning business in Columbus, Ohio, consisted of real estate mortgage loans. The Court held that national banks "do not . . . invest their funds generally in this manner" (59 F. 2d. 482). Cf *Shreveport*, supra, p. 23.

So, also, the modern association bears no real resemblance to its early predecessor.[22] The associations of today are statewide and even nation-wide in operation. Their moneyed capital is no longer obtained from or loaned to the poorer classes. Their savers and residential mortgage borrowers, like those of the modern banks, are the general public—every economic and income class of society. Savings and loan associations are no longer mutual. It is not now necessary that a savings investor be a borrower or that a borrower be a savings investor. The interest of each is independent of the other. The savings investor seeks only the highest rate of return consistent with the safety of his investment. The borrower seeks only the most advantageous mortgage terms. The borrowers are a separate group from the investors, with different and often conflicting economic interests. The borrower is undoubtedly unaware of the technical difference that exists between dealing with such associations and dealing with any other financial institution, such as a bank. Certainly, the associations in recent years do no more to encourage thrift or home ownership than do the national banks.[23]

---

[22]After the completion of plaintiff's case, the Trial Court, in denying defendants' (appellees') motion to dismiss, was impelled by the proof to observe that savings and loan institutions had changed—**"at least the poor people angle is out of the picture."** (669a)

The character of Michigan savings and loan associations having changed from 1887 (when they were exempt from taxation) (Act 50 P.A. of 1887; M.S.A. 23.558), Michigan now taxes savings and loan associations and their shares. The reason for exemption no longer obtains.

---

[23]The modern national banks (including appellant), through their savings departments, actively encourage thrift among the same general public as the savings and loan associations; and actively promote, through their mortgage departments, home ownership among the same general public as the savings and loan associations by making residential mortgage loans on the same terms and the same security as do the associations.

To illustrate their recent size and strength, approximately one (1) out of every three (3) mortgages on all classes of residential real estate made in Michigan and in the United States in 1952 were made by such associations, and this ratio has steadily increased to over 40% at the present time.[24]

The associations' growth picture has been dramatic. In 1900, all associations in the United States had total assets of only $571,367,000 (Exhibit 221). By 1952, their assets had grown to $19,200,000,000. In 1900, total assets of all Michigan associations equalled only $10,118,000. By 1952, total assets had increased to $537,695,000 (Exhibit 221), which figure almost equalled the total assets of all associations in the United States in 1900. At the end of 1959, the size of these financial institutions had reached the startling figure of $63,472,000,000 in the United States, and $1,679,000,000 in Michigan.

The growth of savings and loan associations—particularly since 1952—is illustrated by the following chart.

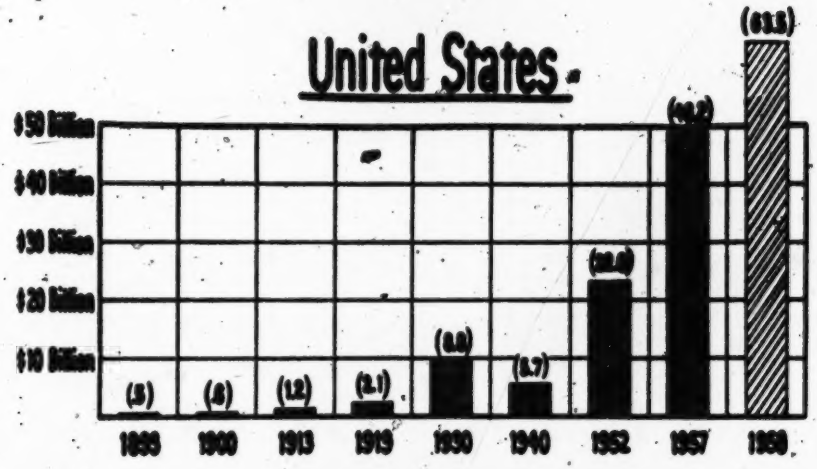
---

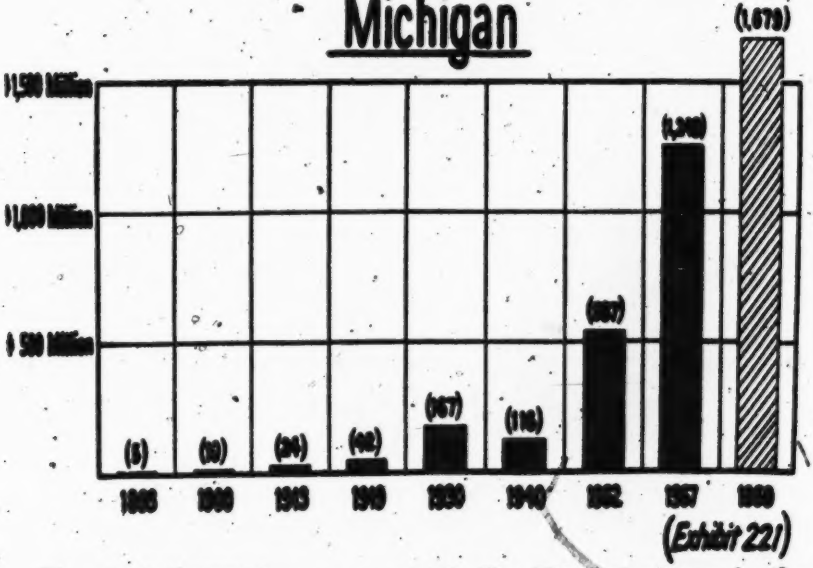
[24]In view of the astonishing growth of savings and loan associations due largely to discriminatory tax advantages inuring to the competitive benefit of savings and loan associations as compared with banks, it is not surprising that Norman Strunk, executive vice-president of the United States Savings and Loan League, at the Annual Conference of the American Savings and Loan Institute at Chicago in March, 1960, predicted that by 1970 the assets of the business would be approximately $165 billion as compared to $65 billion at present, that savings and loan associations would be doing 55 per cent of all home financing as compared to 40 per cent today, and that several associations would be billion dollar institutions.

Moreover, Mr. Strunk in a forewarning to banks stated that "bank stockholders would be better served if the banks were to stop trying to attract savings deposits . . . "

Growth of Savings & Loan Associations

Assets





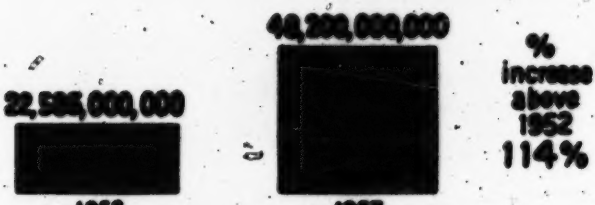
The shaded 1959 figures are not in Ex. 221, but appear in the monthly report of Federal Home Loan Bank Board.

Moreover, the growth of savings and loan associations in the United States from 1952 to 1957 (114%) has outstripped the growth of national banks (3%) during the same period. Stated in another way, the asset growth of savings and loan associations during that period was approximately $25,600,000,000, as compared with the increase in assets of national banks of only about $3,300,000,000, or about 8 to 1. See following chart.

Growth of Savings & Loan Associations Compared to National Banks—United States

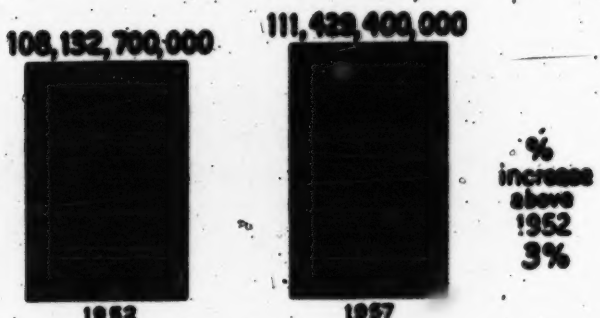
—Assets—

All Savings & Loan Associations



(Exhibit 221)

All National Banks



(Exhibit 219)

To favor savings and loan associations and their shareholders taxwise in the light of their ascendant growth and dominant position in the residential mortgage loan business is indefensible under R. S. 5219. No longer a small, poor man's institution with limited resources—but huge, powerful organizations aggressively competing for profit with important segments (residential mortgages and savings)[25] of the business of national banks—there is no just or valid reason why they should be exempted or favored.

R. S. 5219 does not prevent the states from taxing shares of national banks. It only provides that if such shares be taxed by the state, the tax must be on a basis of equality with other competing moneyed capital. The state does not suffer by this requirement. In the instant case, the state revenues would be increased if the present tax rate on national bank shares were maintained and the associations were similarly treated. In such event, savings and loan associations—on the basis of tax equality—would be required to pay at least 6

---

[25]The more a taxing authority prefers savings and loan associations taxwise, the greater the margin of profit they enjoy over national banks in the competing area of residential mortgages. The more profit advantage they thus enjoy, the greater dividends they are enabled to pay to their shareholders. As a result, they have successfully advertised for and attracted increasingly greater amounts of surplus funds, which otherwise would have been put into savings accounts of national banks or invested in their shares. With these increasing amounts of moneyed capital (favored taxwise) thus obtained, the associations have had increasing resources to use in the competing residential mortgage loan business, while the national banks—thus competing at a disadvantage—lose in savings account resources which they would employ in the residential mortgage business and lose in earnings, which affect the value of their shares.

As was said in *Mercantile*: "A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of state laws were exempt from an equal burden." (121 U.S. 138, 155)

million dollars a year more taxes to the State of Michigan—which they now escape.

This Court surely does not decide a case because of historical labels—no longer apposite in modern day society and economy. Principles are not blindly applied to completely different economic facts of life. An 1890 association is not a 1952 association except in name only.

As the late Justice Cardozo said in his treatise, "Nature of the Judicial Process" (page 81):

> "Courts know today that statutes are to be viewed, not in isolation or *in vacua* * * * but in the setting and the framework of present-day conditions * * *."[26]

Tax equality is the injunction of R. S. 5219. Under the compelling facts in this case, we submit that this Court should not permit the statutory safeguard against discrimination to be undermined or whittled away.[27]

---

[26]Citing: *Muller v. Oregon*, 208 U. S. 412; Pound, "Courts and Legislation," 9 Modern Legal Philosophy Series, p. 225; Pound, "Scope and Progress of Sociological Jurisprudence," 25 Harvard L. R. 513; cf. Brandeis, J., in *Adams v. Tanner*, 244 U. S. 590 [616]. See also *Holden v. Hardy*, 169 U. S. 366, 387.

See Oliver Wendell Holmes, "Collected Legal Papers," p. 187.

[27]See pending case in Pennsylvania, in the Court of Common Pleas of Dauphin County, Pennsylvania, Equity No. 2395, No. 25, Commonwealth Docket, 1960; Mellon National Bank and Trust Company, The Philadelphia National Bank, Pittsburgh National Bank, Central-Penn National Bank of Philadelphia, Western Pennsylvania National Bank, The Union National Bank of Pittsburgh, The First National Bank of Erie, First National Pennsylvania National Bank and Trust Company, Easton National Bank, The First National Bank of Altoona, Northeastern Pennsylvania National Bank and Trust Company, Eastern National Bank and Trust Company, The National Bank of Boyertown, The Conestoga National Bank of Lancaster, Plaintiffs, v. Charles M. Dougherty, Secretary of Revenue, Defendant.

CONCLUSION

Wherefore, it is respectfully submitted that this Court has jurisdiction of this appeal under Section 1257 (2) of Title 28, United States Code.

Respectfully submitted,

Thomas G. Long

Victor W. Klein

Philip T. Van Zile, II,

Harold A. Ruemenapp,

Attorneys for Appellant
MICHIGAN NATIONAL BANK

June 17, 1960

APPENDIX A

Trial Court Opinion

January 20, 1959

Plaintiff, a national bank, seeks to recover the amount of $49,929.27 paid by it under protest to the state. Such sum represented a deficiency assessed against plaintiff for the 1952 intangible tax pursuant to Act No. 9 of the Public Acts of Michigan for 1953 which amended the Intangible Tax Act (Act 301, Public Acts of 1939; M. S. A. 7.556(2a)) with respect to the taxation upon shares of the stock of national and state banks and trust companies.

It is settled law that:

> " 'National banks are not merely private moneyed institutions, but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property and their shares cannot be taxed under state authority except as Congress consents and then only in conformity with the restrictions attached to its consent'. *First National Bank* v. *Anderson*, (269 U. S. 341). *Des Moines Bank* v. *Fairweather*, 263 U. S. 106." *First National Bank* v. *Hartford*, 273 U. S. 548, 550.

See also:

> *People* v. *Weaver*, 100 U. S. 539;
> *Talbot* v. *Silverpaul County*, 139 U. S. 138;
> *First National Bank* v. *Adams*, 258 U. S. 362.

Congress, by appropiate action, has permitted the taxation of shares in national banks subject to certain restrictions. This consent and the restrictions are now found in R. S. Section 5219, which reads in part:

> "The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived

therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

"(b) In case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section." U. S. Code, Title 12, Section 548.

Plaintiff contends that the Michigan Intangible Tax Act fails to meet the requirements of Section 5219 in two particulars: (1) Michigan National Bank shares are taxed at a greater rate than other moneyed capital in the hands of individual citizens coming into competition with the business of the plaintiff bank, (2) that the Michigan Statute levies a tax upon "the privilege of ownership" of shares in national banks, that this is not the legal equivalent of a tax upon the shares in such banks and is not one of the alternate methods of taxation permitted.

Certain other national banks have intervened in the cause asserting that they similarly paid under protest the taxes levied under the amended Intangible Tax Act and seek to recover the amounts so paid. For the purpose of expediting the determination of the legal questions, the intervener action by order of the Court was separated from the trial of the plaintiff's case. The proofs introduced related solely to plaintiff's case and the decision to be made upon this record will adjudicate only that case.

Initially, the moneyed capital alleged by plaintiff to be in competition with it and to be taxed at a lesser rate included building or savings and loan associations, insurance corporations, credit union, finance companies, and monies in the hands of individuals and partnerships.

Shortly before the commencement of trial, plaintiff abandoned its claim insofar as insurance corporations, credit unions, finance companies and individuals and partnerships were concerned and its counsel stated that it would confine its case to the competition which national banks face in this state with building and savings and loan associations, both state and federal.

The institutions referred to are usually known as "building and loan associations" when organized under state laws, and as "savings and loan associations" when organized under the federal statute. The Michigan Statute is Act No. 50 of the Public Acts of 1887 as amended (M.S.A. 23.541 et seq.) and the Act of Congress is the Home Owners Loan Act of 1933 (U.S.C.A. Section 1464 et seq.)

Plaintiff has its principal banking office in the City of Lansing. It carries on the banking business in that city and in the Cities of Battle Creek, Flint, Grand Rapids, Marshall, Port Huron, and Saginaw.

In these cities there are sixteen building/savings and loan associations.

Without attempting to state in detail the proofs (the record consists of some 1750 pages of transcript, numerous depositions and some hundreds of exhibits), it may be said that plaintiff claims that the proofs bring the case within the rule stated in *First National Bank* v. *Hartford,* 273 U.S. 548:

> "Competition may exist between other moneyed capital and capital invested in national banks, serious in character and therefore well within the purpose of § 5219, even though the competition be with some but not all

phases of the business of national banks. Section 5219 is not directed merely at discriminatory taxation which favors a competing banking business. Competition in the sense intended arises not from the character of the business of those who compete but from the manner of the employment of the capital at their command. * * * To so restrict the meaning and application of §5219 would defeat its purpose. It was intended to prevent the fostering of unequal competition with the business of national banks by the aid of discriminatory taxation in favor of capital invested by institutions or individuals engaged either in similar businesses or in particular operations or investments like those of national banks. Mercantile Bank v. New York, supra 155. With the great increase in investments by individuals and the growth of concerns engaged in particular phases of banking shown by the evidence in this case and in Minnesota v. First National Bank of St. Paul, today decided (273 U.S. 561) p. 561, discrimination with respect to capital thus used could readily be carried to a point where the business of national banks would be seriously curtailed. Our conclusion is that §5219 is violated wherever capital, substantial in amount when compared with the capitalization of national banks, is employed either in a business or by private investors in the same sort of transactions as those in which national banks engage and in the same locality in which they do business" (557-558).

"We do not conceive that in order to establish the fact of competition it is necessary to show that national banks and competing investors solicit the same customers for the same loans or investments. It is enough as stated if both engage in seeking and securing the same locality capital investments of the class now under consideration which are substantial in amount." (559).

In support of such claim, plaintiff offered a mass of statistical evidence as to the capital, assets, savings accounts, loans and investments of national banks, nationally, statewide and of the plaintiff national bank. Like evidence was offered as to the business of the savings/building and loan associations, nationally, statewide and in the seven cities in which plaintiff did business.

Plaintiff further offered the testimony of officers of the loan associations and of the plaintiff banks as to the existence of competition between the two types of institutions.

And plaintiff forcefully urges that such evidence establishes that both plaintiff and defendant make loans upon the security of mortgages on residential real property and that in that field there exists, in fact, substantial competition between the plaintiff bank and the several savings/building and loan associations.

Plaintiff further contends that the rate of tax levied against the shares of national banks is several times that levied against the shares of savings/building and loan associations.

Defendants take issue with plaintiff upon the existence of competition in fact, and upon the existence of discrimination in the rate of tax against the two types of institutions.

With reference to competition, in fact, defendants contend that the savings and loan association operating in the area of plaintiff bank are small institutions as compared to the plaintiff; that they function solely in a very narrow and restricted field compared to the varied activities of plaintiff and other national banks; that the savings and loan associations' basic organization and financial structure are so different from national banks that they cannot be compared with such institutions; that the alleged competing savings and loan associations concentrate their loans in conventional loan activity prohibited to plaintiff bank while plaintiff concentrated its loan activity in fields (F.H.A. and V.A.) not utilized by the savings and loan associations; that the proofs offered do not sustain a finding that the capital employed by savings and loan associations in 1952 represented a substantial portion of capital employed in any alleged competition by the savings and loan associations with the business of the plaintiff and other national banks; that plaintiff had no difficulty in obtaining all the capital it needed in 1952 and could not trace any part of its capital to any investments and

that in 1952 it loaned only its deposit money on security of real estate.

And defendant summarizes its position on this factual issue as follows: "in the last analysis, savings and loan associations cannot be in 'substantial competition with the business of national banks' because they cannot and do not engage sufficiently in the activities characteristically carried on by the national banks. Stated another way, if they are not comparable institutions in substance, how can they be in substantial competition?"

Upon the issue of discrimination, it is defendants' contention that the Michigan Intangible Tax from the standpoint of the economic impact, imposes an equivalent tax burden on national banks and savings and loan associations.

Defendants further present certain serious contentions of law which if decided in favor of defendants, make the determination of the above issues of fact unimportant. These, to a certain extent, overlap and may be briefly summarized: first, that the states have the power to give preferential tax treatment to thrift and home financing institutions such as mutual savings banks and savings/building and loan associations upon the ground of public policy without violating section 5219; and, secondly, that Congress by the enactment of the 1933 Home Owners Loan Act has made it clear that the provisions of section 5219 do not apply to savings/building and loan associations.

The banks of Michigan are not unanimous in this litigation.

The Michigan Bankers Association has been permitted to file a brief as amicus curiae in which it states the position of its members in these words:

> "The Michigan Bankers Association has followed the trial of this case and requested permission to file this brief because of its conviction that the present system of

> the State of Michigan for the taxation of banks is reasonable from the viewpoint of the public, equitable from the viewpoint of the competitors, and practical from the viewpoint of the banks themselves. Actual experience with the taxation system shows that it has produced a reasonable amount of revenue to the State; that it has not created any competitive disadvantage among the various types of institutions; and that it has proven to be simple to administer. Such a system is obviously desirable, and this Association, believing the system to be entirely legal within the limitations of the Federal Constitution and Statutes, does not want to see it destroyed."

And their counsel takes substantially the same position upon the several questions presented as does the Attorney General on behalf of the defendants.

Counsel for Michigan Savings and Loan League was likewise given permission to file a brief as amicus. He has not filed a formal brief, but he has by letter contributed to the discussion of the legal issues in this case, particularly with reference to the effect of the 1933 Act of Congress providing for the creating of Federal Savings and Loan Associations.

At the outset, the Court expresses its appreciation of the manner in which this case has been presented. Experienced and able counsel have diligently prepared their cases for trial and the proofs were introduced in an intelligent and effective manner. The briefs of counsel for the parties and for amici have forcefully and persuasively presented their respective views and contentions. What might have been drudgery, has, in fact, been an exceedingly interesting experience in which nearly a century of history of the financial life of the nation, of its legislation and its judicial decisions have been vividly portrayed. The decision of this Court will undoubtedly be appealed and it is believed that the record here made will be adequate to enable the Appellate Court or Courts to arrive at an answer to this question of importance to the states, the national banks and the saving/building and loan associations.

There can be found in the language of the numerous decisions since the passage of the legislation which is now Section 5219 support for the position of each party. To arrive at a correct conclusion as to the meaning of this section, it is necessary, I believe, to gather the intention of Congress in adopting the statute, in revising it in 1923 and 1926, in broadening the powers of national banks to make loans upon the security of real property, in adopting the 1933 legislation providing for Federal Savings and Loan Associations, and in adopting certain other legislation to which reference will be made. And in arriving at the intention of Congress, it is, of course, necessary to review the construction put upon the statute by the United States Supreme Court and by other courts to which the question has been presented.

I shall state my conclusions as briefly as the complexity of the question and a review of the legislative and judicial history of nearly one hundred years will permit.

Between the time in which Andrew Jackson served as President of the United States and the year 1863, the United States was without a national banking system. The conditions which existed in that year and which resulted in action by Congress were described upon the trial by Professor Woodworth, Professor of Finance at the School of Business Administration, in the University of Michigan, whose major field of specialization is money and banking. Mr. Woodworth said:

> "I should say, sir, that the primary emphasis on monetary reform by the founders of the National Banking System grew out of the chaotic state of the currency during the period following the failure to renew the charter of the Second Bank of the United States in 1836 and extending to the establishment of the National System.
>
> "Between one thousand and sixteen hundred state chartered banks issued notes of different designs and sizes, and worst of all these notes varied in value from worthless to part.

"Senator Sherman stated before the Senate that there were over seven thousand genuine kinds of notes in 1862 and some six thousand six hundred kinds of counterfeits. Mr. Sherman made that statement in a speech before the Senate February 10, 1863, quoted in the Congressional Globe, Part 1, 1862 to '63, page 84.

"Moreover, the notes of sound banks were discounted more and more heavily as they strayed farther from the point of redemption. Merchants had to subscribe to currently published bank note dictators listing values of notes and giving assistance in spotting counterfeits. Bank failures with their crippling losses to note holders and depositors were so numerous and widespread that public confidence in banks all but disappeared.

"For examples, there were 28 banks in Michigan in 1839, but by 1843 there were only 2, and in 1848 and 1849 there was only one bank; the number of banks in Ohio dropped from 37 in 1840 to 8 in 1844 and 1845; the 19 banks in Kentucky in 1851 were reduced to 4 in 1853; the number in Tennessee declined from 26 in 1838 to 1 in 1851-1857. These references are quoted from the Annual Report of the Secretary of the Treasury, 1876, pages 222 to 228.

"The lack of safety of banks was not only a drain on business and consumers, but was also a serious obstacle to Federal Government finance. Since the Treasury could not safely keep deposits in the banks, the Acts of 1840 and 1846 established an Independent Treasury System with subtreasuries in leading cities. Under these acts the treasury could receive taxes and other receipts only in specie and Treasury notes, and public funds had to be kept in its own treasuries.

"This arrangement caused periodic disturbance in the money and capital markets, owing to the periodic withdrawals and outpayments of specie reserves. In addition, the Treasury could not rely on the banks to assist in its debt management operations—that is, borrowing, redeeming securities, refunding securities, and so on.

"The founders of the national banking system contemplated that national bank notes would become the only

currency, aside from coins, as soon as the emergency issue of United States notes, popularly called the greenbacks, could be retired in the years following the Civil War."

The proceedings of Congress having to do with the adoption of the provision which was to become Section 5219 are described in "State Taxation of Banks—Woosley" as follows:

"The statutory genesis of the state taxation of national banks to be found in the National Bank Act of 1864. The original act of 1863 contained no provision authorizing the state taxation of national banks, but the debates on the revised measure were enlivened with this issue. Should the banks be subject only to federal taxation or to both federal and state taxation? If the latter, on what constitutional grounds might such taxation rest and by what methods and to what degrees should these banks be taxed by the states?

"In both houses of Congress there was a vigorous group which favored the exclusive taxation of national banks by the federal government, but in both bodies the advocates of joint state and federal taxation were victorious. After a number of proposals for state taxation were made in the House, that body passed a tax clause which permitted the states to tax the capital stock, other than that invested in federal bonds, to the same degree that the property of other moneyed corporations was taxed, with the further proviso that the capital, circulation, dividends or business of national banks might be taxed at no higher rate than that imposed by the state on moneyed capital in the hands of individuals.

"When the measure reached the Senate, the constitutional phases of the question were elaborately discussed. Senator Sumner of Massachusetts urged that the supremacy of the federal government was of such a character as to free these banks as agencies of that government from the potentially destructive taxes of states, citing the dictum of Chief Justice Marshall in McCulloch v. Maryland. The advocates of state taxation, while admitting that the court has held that the United States Bank and its operations were not subject to state taxation, contended that

such immunity did not apply to the shares. Mr. Fessenden of Maine urged that:

> '. . . this opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State.'

"Senator Collamer drew a distinction between the institution and its shares which were the personal property of the shareholders and taxable as such at the situs of the shareholder. Senator Johnson of Maryland, who had heard the case argued before the court, interpreted the decision as declaring that the power of the State of Maryland to tax the shares of the United States Bank was an original power resident in the sovereignty of the state; that while a tax on the franchise or operations of the bank was held invalid by the court,

> '. . . no judge though, and no member of the bar who argued the cause dreamed of denying that it would be in the power of the States to tax the property of their citizens invested in the stock of the Bank of the United States . . . and the Supreme Court closed their opinion, so as to exclude any conclusion which could be drawn as against the taxing power of the States on that point by saying that it is to be understood that Maryland has the right, and every State in which there may be a bank of the United States, either the mother bank or a branch, has the right to tax the real estate which the bank may hold within that State, and to tax the shares of her citizens in that institution.'

"Therefore Senator Johnson concluded that the federal government lacked the power to exempt from state taxation the shares of bank stock invested in government bonds.

"In the end this view prevailed and the state tax clause of the Senate bill provided for the taxation of the market value of bank shares subject to the restrictions that the

> rate imposed should not be higher than the rate on other moneyed capital in the hands of individual citizens nor higher than the rate on state bank shares. In the conference committee the Senate provision was adopted with slight changes and the measure became law on June 3, 1864."

The Act, as adopted, restricted the rate imposed by states upon the shares of national banks to that (1) imposed on other moneyed capital, and (2) imposed on state banks.

In 1868 the second limitation to the rate on state banks was dropped from the Act so that the Act then read, so far as the limitation was concerned:

> "Provided that nothing in this Act shall be construed to prevent all the shares in any of the said associations held by any person or body corporate from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority * * * but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state." (Woosley, 14).

This amendment was related primarily to the situs of taxation of bank shares and the elimination of the limitation to the rate imposed on state banks, was apparently without any particular significance.

There was no further substantial amendment to the Act until 1923, the only change in that period being that in phraseology incident to the general revision of the Federal Statutes in 1878.

Before 1923, at which time substantial amendments were made, many cases involving the meaning of Section 5219 were presented to the United States Supreme Court. If this opinion is to be limited to a reasonable length, reference to only a few of the cases can be made. The decision that has been most cited is *Mercantile National Bank* v. *City of New York*, 121 U.S. 138 (1887) and in the most recent decisions that case con-

tinues to be recognized as the leading case upon the interpretation of Section 5219.

In the opinion which was written about twenty years after the passage of the Act, the Court defines the object of the National Bank Act and the purpose of the section fixing limitation on state taxation and deals at length with the question presented in this case—the power of the State to exempt in whole or in part certain moneyed capital without violating Section 5219.

The bill was filed to restrain the collection of taxes levied by the State of New York on the shareholders of a national bank and it was claimed that the State discriminated in its taxation against such shares in favor of insurance companies, trust companies, railroad companies, savings banks and other institutions. The Court first stated the purpose of the Act creating a National Banking System.

> "The key to the proper interpretation of the Act of Congress is its policy and purpose. The object of the law was to establish a system of national banking institutions in order to provide a uniform and secure currency for the people and to facilitate the operations of the Treasury of the United States." (154).

The Court then considered the purpose of the limitation on the power of the State to tax:

> "It was deemed consistent, however, with these national uses, and otherwise expedient, to grant to the States the authority to tax them within the limits of a rule prescribed by the law. In fixing those limits it became necessary to prohibit the States from imposing such a burden as would prevent the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote. The business of banking, including all the operations which distinguish it, might be carried on under state laws, either by corporations or private persons, and capital in the form of money might be invested and employed by individual citizens in many single and

separate operations forming substantial parts of the business of banking. A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of state laws were exempt from an equal burden. The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy."

At this time, the Statute did not contain the language "coming into competition with the business of national banks" which was added in 1923. However, the Court in the Mercantile case, defined the term then used "moneyed capital in the hands of individual citizens" to mean only such moneyed capital as was in competition with the business of national banks, concluding its discussion on this point with these words:

"Whether property interests in railroads, in manufacturing enterprises, in mining investments, and others of that description, are taxed or exempt from taxation, in the contemplation of the law, would have no effect upon the success of national banks. There is no reason, therefore, to suppose that Congress intended, in respect to these matters, to interfere with the power and policy of the States. The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are

the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital.' Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of Congress."

As stated, the Mercantile Bank case has been cited with approval and followed by the United States Supreme Court in a large number of cases including the most recent on the subject. Thus, in *First National Bank* v. *Anderson,* 269 U.S. 341 (1926), the Court said:

"* * * The earlier decisions have been reviewed from time to time in later cases, and all, taken collectively, may be summarized as showing, so far as is material here—

"1. The purpose of the restriction is to render it impossible for any state, in taxing the shares, to create and foster an unequal and unfriendly competition with national banks, by favoring shareholders in state banks or individuals interested in private banking or engaged in operations and investments normally common to the business of banking. *Mercantile National Bank* v. *New York,* 121 U.S. 138, 155; *Des Moines National Bank* v. *Fairweather, supra,* 116.

"2. The term 'other moneyed capital' in the restriction is not intended to include all moneyed capital not invested in national bank shares, but only that which is employed in such way as to bring it into substantial competition with the business of national banks. *Mercantile National Bank* v. *New York, supra,* 157; *Aberdeen Bank* v. *Chehalis County,* 166 U.S. 440, 461."

The Court in the Mercantile case further passed upon the question of the power of the State to exempt certain property —moneyed capital invested in savings banks—upon the ground of public policy and without violating Section 5219. And it is upon this part of the opinion and upon later cases

involving savings banks that defendants rely in support of their contention that states may, without violating Section 5219, exempt or prefer moneyed capital invested in building and loan associations.

Because it is defendants' claim that building and loan associations are not different in their purpose, object or practical effect from mutual savings banks, it is appropriate at this point to briefly describe these latter institutions which were before the Court in the Mercantile and other cases to be cited. Professor Woodworth describes them in his testimony and they are to some extent pictured in the opinions in the Supreme Court to which reference will be made.

Mutual Savings Banks first appeared in this country in 1816. They had no capital stock, their funds came from savings deposits, they were operated by a board of trustees chosen in various manners, their "capital" consisted of their surplus and reserves above liability to depositors. In general, their funds were invested in financing home ownership. All earnings except those retained for surplus reserve went back to the depositors.

The Mercantile Bank case was not the first case in which the power of the State to exempt property on the ground of public policy was considered. In *People* v. *Commissioners,* 4 Wall. 244 (1866) the Court said:

> "It is known as sound policy that in every well regulated and enlightened state or government certain descriptions of property and also certain institutions—such as churches, hospitals, academies, cemeteries, and the like—are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation even where the fundamental law had ordered that it should be uniform."

In *Adams* v. *Nashville,* 95 U.S. 19 (1877), a suit by stockholders of a national bank to enjoin collection of a tax, the Court said:

"The act of Congress * * * was not intended to cut off the power to exempt particular kinds of property if the legislature chose to do so."

In *Hepburn* v. *School Directors*, 234 Wall. 480, (1874), the Court said:

"It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt. Certainly, there was no presumption in favor of such an intention."

In the Mercantile Bank case, decided in 1887, the Court sustained, as not violating Section 5219, an exemption of savings banks. In doing so, the Court said:

"In the case of savings banks, we assume that neither the bank itself nor the individual depositor is taxed on account of the deposits. The language of the statute (§4, c.456, Laws of 1857) is as follows: 'Deposits in any banks for savings, which are due to the depositors, . . . shall not be liable to taxation, other than the real estate and stocks which may be owned by such bank or company, and which are now liable to taxation under the laws of this State.'

"According to the stipulation in this case, the deposits in such banks amount of $437,107,501, with an accumulated surplus of $68,669,001. It cannot be denied that these deposits constitute moneyed capital in the hands of individuals within the terms of any definition which can be given to that phrase; but we are equally clear that they are not within the meaning of the act of Congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must thereby also be exempted from taxation. No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States. They are what their name indicates, banks of deposit for the accumulation of small savings belonging to the industrious and thrifty. To promote their growth and progress is the obvious interest and manifest policy of the state. Their multiplication cannot in any sense injuriously affect any legitimate enterprise in the com-

> munity. We have already seen that by previous decisions of this court it has been declared that 'it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt;' Hepburn v. School Directors, 23 Wall. 480; and that 'the act of Congress was not intended to curtail the state power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property, if the legislature chose to do so.' Adams v. Nashville, 95 U.S. 19. The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exemptions should be founded upon just reason, and not operate as an unfriendly discrimination against investments in national bank shares."

It is to be noted that the Court gives two reasons for its holding. First, stating that savings banks do not come into competition with national banks and, secondly, stating that the statute was not intended to cut off the power to exempt particular kinds of property if the legislature chose to do so and if the exemption be founded on just reason and not operate as an unfriendly discrimination against investments in national bank shares.

The Court was to make clear which of these two reasons it considered the controlling one in later cases which came before it. A few months after the decision in the Mercantile Bank case, *Davenport Bank* v. *Davenport*, 123 U.S. 83 (1887) was decided. The decision in the case may be distinguished upon the ground that there was in fact no actual discrimination against national banks. The opinion of the Court is of importance because the Court which had decided the Mercantile Bank case, took occasion to state the reason for its decision in that case; the Court said:

> "The whole subject has been recently considered by this court in the case of Mercantile Bank v. New York, 121 U.S. 138. In that opinion it was held that, while the

deposits in the savings banks of New York constituted moneyed capital in the hands of individuals, yet it was clear that they were not within the meaning of the act of Congress in such a sense as to require that because they were exempted from taxation the shares of stock in national banks must also be exempted. The reason given for this is that the institutions generally established under that name are intended for the deposits of the small savings and accumulations of the industrious and thrifty; that to promote their growth and progress is the obvious interest and manifest policy of the State; and, as was said in Hepburn v. School Directors, 23 Wall. 480, it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt."

Less than a year later, the *Bank of Redemption* v. *Boston*, 125 U.S. 60 (1888) was decided and the opinion was written by Mr. Justice Matthews who had written the opinion in the Mercantile Bank case. Plaintiff bank alleged that the State of Massachusetts collected from national banks a tax of $1,564,995.00 upon bank shares of 113 million dollars, while upon 163 million dollars of savings bank deposits it collected only $815,930.00.

Plaintiff sought to distinguish the Mercantile case by the allegation that in Massachusetts, savings banks were permitted to transact a banking business in the way of loans upon personal securities "which assimilates them more closely to national banks and takes away the reason for the application of the rule to them which was applied to the case of the savings banks of New York."

The Court held that section 5219 was not violated, saying: "The question of exemption from taxation of deposits in savings banks as affecting the rule for state taxation of national bank shares was very diligently considered by this Court in the case of Mercantile Bank v. New York, 121 U.S. 138, 160; and the conclusion reached in that case was reaffirmed in the case of *Davenport Bank* v. *Davenport Board of Equalization*, 123 U.S. 83."

Answering the contention as to actual competition and the difference between the facts in New York and Massachusetts, the Court said:

> "But the difference mentioned, if it exists at all, is immaterial; the main purpose and chief object of savings banks, as organized under the laws of Massachusetts, are the same as those in New York, as considered in the case of the Mercantile Bank. They are substantially institutions, under public management, in pursuance of a great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and not as banking institutions in the commercial sense of that phrase. We adhere to the rule as declared in the cases heretofore decided, which forecloses further discussion as to the present point in this case."

I have not been cited, nor have I been able to find any subsequent decision of the United States Supreme Court which squarely involved discrimination in favor of savings banks. In two later decisions, however, the Court did recognize the validity of the rule of exemption stated in the cases which have been cited.

In *Aberdeen Bank* v. *Chehalis County,* 166 U.S. 440 (1896), the Court, referring to the Mercantile Bank case, said:

> "As to savings banks it was held that, though it could not be denied that their deposits constituted moneyed capital in the hands of individuals, yet it was clear that they were not within the meaning of the act of Congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must also be exempted; that it was part of the policy of the State to encourage the accumulation of small savings belonging to the industrious and thrifty, and it was within the reasonable exercise of the power of the State to exempt particular kinds of property, and the conclusion of the court, in respect to savings banks, was thus expressed." (Quoting from the Mercantile Bank case.)

And in *National Bank* v. *Chapman,* 173 U.S. 305 (1898),

the Court, after referring to the Mercantile Bank and other cases, said:

> "* * * and that exemptions from taxation, however large, such as deposits in savings banks or monies belonging to charitable institutions which are exempted for reason of public policy and not as an unfriendly discrimination as against investments in national bank shares, cannot be regarded as forbidden by the Federal Statute (214)."

It is the claim of the defendants that building and loan associations are in the same class of institutions as savings banks. They are described at length in the testimony of Professor Woodworth. Because they will be described in the statutes and decisions to which reference will be made, I shall not summarize his testimony except to state his conclusions:

> "Q. Now, referring to 1952, were savings and loan associations similar to national banking associations?
>
> "A. I should say they were not.
>
> "Q. Were they similar to any other financial institution?
>
> "A. Yes, I should say savings and loan associations were quite similar to mutual savings banks."

The power of the State to exempt or favor moneyed capital invested in the shares of building and loan associations had not been decided by the United States Supreme Court prior to the 1923 amendments to the statutes. It had, however, met judicial consideration in *Mercantile Bank of Cleveland* v. *Hubbard*, 98 Fed. 465 (1899). The opinion was written by Circuit Judge Taft who said; after citing Bank v. Chapman, 173 U.S. 205;

> "I do not find that there was anything more of substance before the master than there was before the supreme court upon this issue of fact. There is proof of the capital in savings banks, and also of the capital invested in building and loan associations; but, under the decision of Mercantile Bank v. City of New York, 121

U.S. 138, 7 Sup. Ct. 836, 30 L. Ed. 895, capital invested in savings banks cannot be regarded as moneyed capital, within the meaning of section 5219, exemption of which from taxation can constitute a discrimination within the inhibition of that section. It seems to me that building associations are certainly not to be differentiated in their purpose or object, or practical effect, from savings banks, and that the capital invested in them, though subject to a somewhat different rule of taxation, cannot be regarded as moneyed capital in competition with the moneyed capital in national banks, any more than in capital invested in savings banks. The chief object of building associations is to encourage the building of small houses by poor people, and the savings from their earnings, week by week, of an amount sufficient to pay the mortgage debts incurred in the purchase of the land and the construction of the house. The mere fact that every shareholder in a building association need not be a borrower cannot, I think, change the effect of the general purpose af the building association law. The general result of the evidence is no more satisfactory as showing what amount of discrimination, if any, there is by reason of this definition of 'credits' in the Ohio statute of taxation, than it was in the case of Bank v. Chapman. For this reason I must conclude, as the master did, that the averments of the bill as to the discrimination, arising from the operation of this definition of 'credits,' against money capital, is not such as to justify any action by the court in the complainant's favor."

This decision was before the Circuit Court of Appeals, 195 Fed. 809, and the United States Supreme Court in 186 U.S. 458 (under the case of *Lander* v. *New York Bank*), but in neither appellate court was the question of exemption of building and loan shares presented or decided.

This was the state of the case law with respect to the power of the state to exempt such associations as mutual savings banks and building and loan associations upon the ground of public policy when Congress amended section 5219 in 1923. I cannot escape the conclusion that at that time, it was established law that the state had the power to exempt on the

grounds of public policy insitutions of the general character of mutual savings banks without violating section 5219. The Court had so announced the law in the five cases which have been discussed. In no case had it overruled or disapproved the principles of those cases. And Judge Taft in the Hubbard case had applied the rule to building and loan associations and while this is not conclusive, counsel who took the case to the Court of Appeals and to the Supreme Court does not have appeared to have challenged his ruling as to building and loan associations in either of those courts.

In arriving at the intention of Congress in its adoption of the 1923 amendment to section 5219, attention must be given to the events which preceded and apparently provided the reason for such legislation.

In 1921 the Supreme Court decided Merchants National Bank v. Richmond, 256 U.S. 635, and held that the words "moneyed capital" included "not only monies invested in private banking, so-called, but investments of individuals in securities that represent money, the interest, and other evidences of indebtedness that normally enter into the business of banking."

The facts were that the State and city had taxed bank shares at $1.75 per hundred dollars while bonds, notes and other evidence of indebtedness in the hands of individuals were taxed at the combined rate of ninety-five cents per hundred dollars. The Court held that section 5219 was violated.

The case did not involve building and loan shares or savings banks. The court in its opinion quoted with approval the Mercantile definition of moneyed capital, but did not discuss exemptions of such institutions on the ground of public policy.

The decision is said by Woosley (Page 53) to have imperiled share taxes in eight classified property tax states and in twelve other states which exempted moneyed capital from

the property tax and substituted therefor an income tax. Large numbers of suits were commenced by national banks and in some states the banks refused to pay taxes assessed against them.

Alarmed state officials inaugurated a movement to amend section 5219 and a bill was prepared and introduced in the House to permit states to tax shares of national banks or the income therefrom subject only to the restriction that the burden imposed should not be heavier than that levied upon capital invested in state banks or upon the income therefrom (Woosley, 53, 54). The ensuing proceedings are portrayed by the same author and may be read with interest.

It is sufficient here to say that it does not appear that at any time in any of the several proposals considered in the two Houses of Congress that there was an effort made to legislate against the power of the states to exempt savings banks, building and loan associations or other like institutions on the ground of public policy.

The bill that finally emerged as the law provided for three alternative methods of taxation of interest in national banks:

(1) a tax upon shares;

(2) net income tax on the banks;

(3) tax on net income from dividends to owners of shares.

With respect to the tax upon bank shares, the language of section 5219 was amended to read that the tax shall not be at a greater rate "than is assessed upon other moneyed capital in the hands of individual citizens of such state *coming into competition with the business of national banks.*" (Emphasis added.)

Woosley, citing the Congressional record, states upon consideration of the amended House Bill which was to eventually pass the House and Senate and become the law, Representative Wingo declared:

> "That the bill offered 'a tried simple rule that is well settled by a long line of judicial decisions with such additions to it as will clearly and more equivocably overule the Richmond decision."

While, as will be seen, Mr. Wingo proved a poor prophet as to the future effect of the legislation upon the Richmond decision, his statement is of interest upon the question of whether Congress had any intention of changing the rule of the Mercantile and other savings banks cases upon the power of the State to exempt such property on the ground of public policy.

The effect of the 1923 amendment came before the Supreme Court in *First National Bank* v. *Anderson,* 269 U. S. 341, decided in 1926. The Court there approved its holding in the Richmond case and said:

> "The defendants say that this re-enactment was intended as legislative interpretation of the prior restriction and that the proceedings resulting in its adoption so show. But, assuming that this is true, the situation is not changed; for the re-enactment did no more than to put into express words that which according to repeated decisions of this Court was implied before."

And the court proceeded to quote from the Mercantile Bank opinion in its definition of moneyed capital.

In 1926 the statute was again amended by adding the fourth alternative method of taxing national banks—that of imposing a franchise or excise tax and by permitting a tax on dividend income to be combined with either corporate or net income or franchise tax. This apparently was the result of an agreement between representatives of the banks and of the states and has no significance here (Woosley, page 63).

If it be accepted that by virtue of the decisions in the savings banks cases it had become established law that the states had power to exempt savings banks and like institu-

tions upon the ground of public policy, it is difficult to find in the history and language of the 1923 and 1926 amendment to section 5219 any evidence on the part of Congress to take from the states that power.

Certainly, the power of the states to grant exemptions on the ground of public policy was an important power. It had been recognized throughout the first fifty years of the life section 5219 and to terminate it would affect the validity of many state taxation systems. I am not persuaded that the intent to do so should be inferred from an amendment which does not mention the power and the passage of which was brought about by certain considerations having nothing to do with the existence of that power.

It is the further contention of the plaintiff that by reason of certain amendments to the Federal Reserve Act the power of national banks to loan money on the security of real property was greatly broadened, that the increased exercise of such power by the banks has resulted in substantial actual competition between national banks and other moneyed capital in the field of loans on residential property and that the Court recognized such competition in its decision in *First National Bank* v. *Hartford, supra,* and in *Minnesota* v. *First National Bank,* 273 U. S. 561.

The plaintiff has in its brief reviewed the legislation having to do with national bank loans on the security of real property as follows:

> "An historical review of Section 24, Federal Reserve Act (12 U. S. C. 371), as amended (which prescribes the authority of national banks to make loans secured by real estate), reveals that prior to 1916, national banks were not authorized to loan money on the security of real estate, with the exception of certain farm land. By Act of September 7, 1916, the first grant of authority by Congress to loan on residential real estate was made to national banks. This enabled national banks to loan money on the security of improved real estate to

the extent of 50% of actual value for a term of no longer than one year. With the exception of the Act of February 25, 1927, which extended the term of said mortgages to no longer than five years, no material change was made in the national banks' authority to loan on the security of residential mortgages until 1934.

"In 1934 (Act of June 27, 1934), national banks were permitted to make mortgage loans under Title II, National Housing Act (12 U. S. C. 1701 et seq.), commonly described as F. H. A. mortgages. By Act of August 23, 1935, amending Sec. 24 of the Federal Reserve Act, national banks were authorized to make residential mortgage loans in the amount of 60% of the appraised value of the property for a term of ten years if 40% of the mortgage principal were amortized within ten years. By Comptroller General's decision of 1944, national banks became participants in the V. A. (or G.I.) home loan program.

"Accordingly, in 1952, national banks were authorized to make F. H. A. mortgage loans, V. A. mortgage loans, and liberal conventional mortgage loans."

First National Bank v. Hartford was decided in March, 1927. The Supreme Court in a suit by a national bank to recover the amount of tax assessed and collected upon its shares of stock reversed a judgment for the defendant and held that the Wisconsin statute was invalid as being in violation of section 5219. The Court summarized the evidence as to the alleged competing moneyed capital in the hands of real estate firms which loaned money, and in the hands of individuals, co-partnerships and corporations engaged in the business of acquiring and selling notes, bonds, mortgages and securities. The Court held that there was competition, in fact, with the business of national banks and stated its reasons therefor in the language previously quoted in this opinion. In the decision of the Wisconsin Supreme Court in the same case, (203 N. W. 721, 733-4), the matter of tax preference to building and loan associations was discussed and the Wisconsin Court insofar as such institutions was concerned

gave consideration to the savings bank cases and to the Hubbard case, but in the United States Supreme Court opinion, the Court, in its description of the competing capital involved, did not base its decision on any claimed competition between banks and such associations.

The Supreme Court did in the Hartford case cite with approval the Mercantile Bank case on three different occasions, but it did not consider or decide the matter of exemption by the states on the ground of public policy of savings banks, building and loan associations or other like institutions.

Nor did the Minnesota case, decided on the same day as the Hartford case, mention building and loan associations and the opinion does not discuss exemptions on the ground of public policy.

If the savings bank cases had been grounded on the lack of actual competition between those institutions and national banks, the argument of counsel that those decisions were no longer applicable because of the broadened powers of national banks would be persuasive, in those cases in which the banks had actually exercised those broadened powers and proof of actual competition within the definition of that term in the Hartford case actually existed.

But if the real basis of the savings banks cases was the power of the states to exempt on the ground of public policy without regard to the existence or actual competition, then I do not find in the legislation broadening the powers of national banks or in the opinion of the Supreme Court in the Hartford and Minnesota cases any evidence of an intention to take from the states the power to grant such exemptions.

And it is a little difficult to believe that the Court in the Hartford case, relying so heavily on the principles of the Mercantile Bank case, intended to overrule that part of that decision relating to the power of the state to exempt on

the ground of public policy without once mentioning the subject.

With this background of the history of the legislation and of its judicial interpretation, we now reach the precise question presented in this case—did the State of Michigan in 1952 have the power to exempt or prefer savings/building and loan associations without violating section 5219?

The 1899 decision of Judge Taft in the Hubbard case has already been discussed. The question was next considered by a Federal Court in 1932 in *Hoenig* v. *Huntington National Bank,* 59 Fed. 2d 479 (C. C. A.—6 certiorari denied October 17, 1932, 287 U. S. 648).

In this suit three national banks contended that section 5219 had been violated because of the preferential treatment given by the State of Ohio to building and loan associations.

The Court of Appeals reversed the District Court which had held that actual competition in fact existed between the national banks and the savings and loan institution and that section 5219 was violated. 45 Fed. 2nd 213.

The Court of Appeals in both the majority and minority opinions cited and recognized the principles of the Anderson and Hartford cases. But the majority of the Court held that the case was governed by the principle of the savings banks cases. It quoted from the opinion of Judge Taft in the Hubbard case that building and loan associations were not to be differentiated in their purpose or object or practical effect from savings banks.

The Court then met the argument that is made in the instant case that there is a difference between the building and loan associations of earlier days and those of today. The Court said:

> "It is insisted, however, that the present day building association is a very different type of institution from the 'small, neighborhood, mutual associations of Judge Taft's

time,' and the emphasis is laid upon the construction of offices in similitude to those of banks, the competition for deposits, the payment of deposits on demand, and the making of loans upon collateral security. We do not think that the general nature of the business of building associations has so far changed as to make the law established by the above-cited cases inapplicable."

And then the Court considered the claim also made in this case as to the change in powers of national banks and said:

"It is quite true that national banks, subject to certain restrictions, are now permitted to loan money upon the security of real estate mortgages, and that the plaintiffs below had taken advantage of this privilege. It is also true that building associations have invested some of their funds in Liberty bonds, and, to a very limited extent, may have made a few investments of idle capital in collateral loans or so-called 'straight' mortgages. But we cannot concede that even as to these investments the building associations are in substantial competition with national banks, or that, as claimed by plaintiffs below, the mere facts that money is loaned by building associations upon promissory notes, at interest and to be repaid in money, and that national banks take the ownership of real estate into consideration in passing upon the credit standing of borrowers, necessarily bring the two classes of institutions into competition. In the broad economic sense this may be so, but it was equally so when People of State of New York v. Commissioners, Mercantile Nat. Bank v. New York, First National Bank of Wellington v. Chapman, and Mercantile National Bank v. Hubbard (Lander v. Mercantile Nat. Bank) were decided. In those cases the fundamental and substantial differences between commercial institutions, such as national banks, and institutions of the insurance company, savings bank, and building association types, were the real bases of the finding of want of competition; and our decision of the present issue is founded upon a recognition of these same differences."

It is the contention of plaintiff that the Hoenig case may be distinguished on the facts as to competition, but if the

portion of the opinion last quoted actually reflects the thinking of the Court of Appeals, additional proof of competition would not have affected the result. This matter of discrimination in favor of building and loan associations has also met consideration by the state courts and they have uniformly held on the strength of the savings bank cases that the state has the power to exempt or prefer building and loan associations. In addition to the state court decisions, in those cases which were appealed to the United States Supreme Court, there are the following: *People* v. *Goldfogle,* 205 N. Y. S. 870; 211 N. Y. S. 85 (1924); *Merchants National Bank* v. *Dawson County,* 19 Pacific 2d 892 (1933); *Consolidated National Bank* v. *Prieme County,* 42 Pacific 291 (1897).

It is the contention of the plaintiff that competition with building and loan associations was actually involved in three decisions of the Supreme Court, *First National Bank* v. *Hartford, supra; Commercial National Bank* v. *Custer,* 275 U. S. 502; *First National Bank of Shreveport* v. *Louisiana State Tax Commission,* 289 U. S. 60.

The Hartford case has already been discussed and as pointed out, while the state court specifically dealt with the effect of competition with building and loan associations, the Supreme Court based its decision on the basis of competition with real estate firms and individuals and did not mention the building and loan associations and did not discuss, much less overrule, the savings bank cases.

Commercial National Bank v. Custer is a like case. The Supreme Court decision is a memorandum opinion only. The opinion of the State Court (245 Pacific 259) discloses that the competition claimed represented money invested in notes in the hands of individuals, in mortgages, in real estate, and investment companies, and in building and loan associations.

The Supreme Court opinion reads:

> "Reversed on authority of First National Bank of Hartford v. Hartford, 273 U. S. 548, 559, 560; Minne-

sota v. National Bank of St. Paul, 273 U. S. 561, 567, 568.".

Inasmuch as neither the Hartford case nor the Minnesota case was decided by the Supreme Court on the basis of competition with building and loan associations and in neither case was there any discussion of the savings bank cases or of the power of the State to exempt on the ground of public policy, I cannot find in the memorandum opinion any intention to overrule those cases or to hold the State without that power. For a discussion of the effect of the Custer case, see *Merchants National Bank* v. *Dawson County,* 19 Pacific 2d 893, 896 (Montana, 1933).

The third case relied upon by plaintiff is the *First National Bank of Shreveport* v. *The Louisiana Tax Commission,* 289 U. S. 60 (1933). The Court there affirmed the decision of the Louisiana Supreme Court in 143 Southern 23.

The State Court had held that the State of Louisiana had not violated either the 14th Amendment of section 5219 by its preferential treatment of loan companies, finance and securities companies, pawnbrokers, homestead and building associations, Federal joint stock land banks, life insurance companies, real estate, mortgage and investment companies, and investment brokers. The Louisiana Court said, insofar as building and loan associations were concerned, and quoting from the savings bank cases, that:

> "even if the tax system complained of by plaintiffs did operate in favor of homestead and building associations (the Louisiana name for building and loan associations), that would not be a cause for complaint."

The United States Supreme Court, affirming the decision of the Louisiana Court, said, in answer to the 14th amendment argument:

> "If we may take judicial notice of the functions of these alleged competitors of the plaintiffs, there appears ample basis for the classification, among other things,

in this: There is a fundamental difference between banks, which make loans mainly from money of depositors, and the other financial institutions, which make loans mainly from the money supplied otherwise than by deposits."

And in disposing of the argument based on section 5219, the Court did not discuss separately the several alleged competitors, but answered the argument of the national bank in the following language:

"The item most strenuously urged upon us is that the plaintiffs were engaged in lending money on mortgages of real estate, a line of business in which many mortgage companies, insurance companies, building and loan associations, and individuals were also engaged; and that the latter escaped taxation thereon. The record discloses that each of the banks held real estate mortgages in a substantial amount. But the fact that the banks held mortgages does not prove that they lent money on the security of those mortgages. These may have been taken to secure pre-existing liabilities or as additional security for personal loans. The Supreme Court found: 'The testimony leaves no doubt that there was no competition with the national banks on the part of any concern lending money on mortgage of real estate, because national banks will never handle such loans.' The record contains evidence ample to support that finding."

Plaintiff urges that the statement as to fnudamental difference between these alleged competitors related solely to the 14th amendment argument and furnishes no justification for a difference in tax treatment insofar as section 5219 is concerned.

And, because the Court in discussing the effect of section 5219, dealt with all the alleged competitors together, plaintiff draws the inference that if as a matter of fact actual competition had been found, the Court would have held that section had been violated because of the preferred treatment of the homestead associations.

I am unable to find the conclusion justified. Again, to agree with plaintiff, the Court must find that the Supreme Court intended to overrule the savings bank cases and to disapprove the decision of Judge Taft in the Hubbard case and that of the circuit court of appeals in the Hoenig case (in which it had but a few months earlier denied certiorari), without once mentioning those decisions nor their basis, that is, the power of the state to exempt on the ground of public policy.

I, therefore, find nothing in the decisions of the Hartford, Custer and Shreveport cases which justifies the conclusion that the Supreme Court has departed from the established law announced in the savings bank cases and applied in the Hubbard and Hoenig cases. The most that can be said of these cases is that perhaps the Court intentionally avoided coming to grips with this question, reserving its decision for a future day. Such a speculation scarcely justifies a trial judge in prophesying that the Court will eventually overrule its earlier decisions.

That the Supreme Court had not at that time lost sight of the principles involved in the savings bank cases is made clear by its opinion two years later in *Hopkins Savings Association* v. *Cleary,* 296 U. S. 315 (1935). Justice Cardozo in the case involving the construction and validity of one provision of the Home Owners Loan Act of 1933, said:

> "A corporation is a juristic person organized by government to accomplish certain ends, which may be public or quasi-public, though for other purposes of classification the corporation is described as private. Dartmouth College v. Woodward, 4 Wheat. 518, 668-672. Cf. the statutes and decisions collected by Brandeis, J. in Liggett Co. v. Lee, 288 U. S. 517, 548, et. seq. This is true of building and loan associations in Wisconsin and in other states. They have been given corporate capacity in the belief that their creation will advance the common weal. The state, which brings them into being, has an interest in preserving their existence, for only thus can they attain the ends of their creation. They are more

than business corporations. They have been organized and nurtured as quasi public instruments. Louisville Gas & Electric Co. v. Coleman, supra. They may not divest themselves of a franchise when once it is accepted if the local statutes or decisions command them to retain it. See opinion of the court below, and cf. Thomas v. Railroad Co., 101 U. S. 71; Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24. How they shall be formed, how maintained and supervised, and how and when dissolved, are matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision, except when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred."

And if the Court by its broad language in the Hartford case and by its emphasis on competition in the Shreveport case indicated any doubt as to the power of the State to exempt building and loan associations, the congressional act later in 1933 appears sufficient reason for holding that Congress has removed that doubt. I refer to the Home Owners Loan Act of 1933 (12 U. S. C. A. 1461-1468).

By that act, Congress for the first time authorized the organization of Federal Savings and Loan Associations. In doing so, Congress defined its purposes in these words:

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the board is authorized under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation and regulation of associations to be known as 'Federal Savings and Loan Associations' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home financing institutions in the United States." Section 1464(a).

In Subdivision 9, the act authorized the secretary of the treasury to subscribe for preferred stock in such associations and by subdivision J to invest in full pay income shares of the associations.

Section 1465 provides:

> "To enable the board to incorporate local thrift and local home financing and to promote, organize and develop the associations herein provided for or similar associations organized under state laws, there is appropriated" certain sums of money.

And in section 1464H, Congress dealt specifically with the taxation of such associations and provided:

> "Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States (except the taxes imposed by sections 1410 and 1600 of Title 26 with respect to wages paid after December 31, 1939, for employment after such date, and except, in the case of taxable years beginning after December 31, 1951, income, war-profits, and excess-profits taxes), and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions."

While the United States Supreme Court has not, so far as I have discovered, determined the general power of Congress to adopt this act (see *Hopkins* v. *Savings and Loan Association*, 296 U. S. 315; *Kay* v. *U. S.*, 303 U. S. 1), the Circuit Court of Appeals (New York) has held that the act is valid as within the constitutional power of Congress to tax, borrow and make appropriations for the general welfare. *U. S.* v. *Kay*, 89 Fed. 2d 219 (C. C. A.).

I find this 1933 action on the part of Congress very significant.

—In providing for the creation of Federal Savings and

Loan Associations, Congress acted under its welfare powers, while in its earlier action providing for national banks, it had acted under its monetary powers.

—In the 1933 Statute, Congress determined that savings and loan associations were "local mutual thrift institutions in which people may invest their funds" and (which) "provided for the financing of homes."

Congress determined that the interest of the people of the United States would be served by the organization and operation of such institutions and that the appropriation of public funds for that purpose was justified.

—Congress determined that the character of savings and loan institutions was so far different from the other financial institutions, that different and preferred tax treatment for the former was justified.

In providing for the taxation of these institutions by the State, Congress could have made the measuring stick, the limit on the rate of taxation, that imposed on national banks, also a creation of Congress. It could have made such measuring stick the rate imposed by the states on state banks and it could have made it that imposed on other moneyed capital. It did none of these things. Instead, it provided that the tax imposed should not be greater than that imposed on "other similar local mutual or cooperative thrift and home financing institutions."

Congress thus identified the institutions that it considered to be in competition with Federal Savings and Loan Associations. Obviously, Congress did not consider savings and loan associations to be in competition with banks, either state or national.

This action on the part of Congress appears to be a clear recognition of the principles which underlie the decisions in the savings bank cases, the Hubbard case, and the Hoenig case. It forcefully negatives the claim that Congress, by

amending section 5219 in 1923, and by broadening the power of national banks, intended to change the law with respect to the preferred treatment by the state of thrift institutions.

Plaintiff further alleges that there has been such a substantial change in the purpose and character of building and loan associations since the savings bank cases and the Hubbard case that those authorities are no longer applicable.

This same contention was answered by the Circuit Court of Appeals in the Hoenig case. It is answered by the testimony of Professor Woodworth in this case and Congress by its definition of the purpose of the 1933 act effectively settles the question of the character and purpose of these institutions.

The Michigan Act has not been substantially changed since its adoption in 1887. It continues to provide that building and loan associations shall not do a banking business and shall not accept or advertise for deposits. It has been amended to make it compatible with the Federal 1933 Statute. Its purposes are to continue to be those stated in the Federal Act, namely:

> "To provide local mutual thrift institutions in which people may invest their funds" and (which) "provide for the financing of homes."

The proofs do not support a finding that there has been any material difference between the Michigan institutions of the present day and those organized under the Federal Statute.

There remains one further question on this branch of the case. The rule, as stated in the savings bank cases, was that the power of Congress to exempt or prefer those institutions on the ground of public policy was subject to the limitation that the exemptions "should be founded upon just reason and not operate as an unfriendly discrimination against investments in national bank shares."

Both the reasoning of the courts in the savings bank cases,

the Hubbard case and the Hoenig case, and the provisions of the 1933 Act relating to Federal Saving and Loan institutions, and those of the Revenue Code giving preferred treatment to such associations in their income taxes (26 U. S. C. A. 116C, 591) furnish convincing proof that Congress had determined and the others recognized just reason for the exemption of preferred tax treatment of these associations.

Upon the trial, plaintiff contended that the Michigan Intangible Tax Act, as amended, imposed a tax on the shares of national banks which was substantially greater than that imposed on building and loan shares.

Defendant answered that because of the difference in character of the two institutions, the actual burden of the tax imposed on building and loan associations and its stockholders was from an economic standpoint substantially equal to the burden imposed on national banks and their stockholders. Citing *Amoskeag Savings Bank* v. *Purdy*, 231 U. S. 373, and *Tradesman Bank* v. *Tax Commission*, 309 U. S. 560.

In the Amoskeag case, the Court said:

> "The State is not obliged to apply the same system to the taxation of national banks that it uses in the taxation of other property, provided no injustice, inequality or unfriendly discrimination is inflicted upon them. There are other considerations to be weighed in determining the actual burden of the tax, one of which is the mode of valuing bank shares—by adopting 'book values'—which may be more or less favorable than the method adopted in valuing other kinds of personal property."

In the Tradesman Bank case, the Court said:

> "A consideration of the course of judicial decision on R. S. 5219 and its predecessors can leave no doubt that the various restrictions it places on the permitted methods of taxation are designed to prohibit only those systems of state taxation which discriminate in practical operation against national banking associations or their shareholders as a class. Compare First National Bank

v. Hartford, 273 U. S. 548; Ahoskeag Savings Bank v. Purdy, 231 U. S. 373; Covington v. First National Bank, 198 U. S. 100; Lionberger v. Rouse, 9 Wall. 468. Thus it is not a valid objection to a tax on national bank shares that other moneyed capital in the state or shares of state banks are taxed at a different rate or assessed by a different method unless it appears that the difference in treatment results in fact in a discrimination unfavorable to the holders of the shares of national banks. Amoskeag Savings Bank v. Purdy, 231 U. S. 373; Covington v. First National Bank, 198 U. S. 100."

Defendant further quotes from an article in 31 Harvard Law Review, 321, 367, in which the author states:

"* * * So long as substantially equivalent burdens are imposed on all other economic values by taxation of tangible property and of the capital and franchises of corporations, it would be absurd to insist that the exemption of one or more of the legal forms of property in which those values may be represented, results in taxing shares in national banks at a greater rate than that imposed on other moneyed capital. The rule of the Mercantile Bank Case practically comes down to a disregard of formal legal discrimination where there is in fact no substantial economic discrimination."

Reference is also made to Woolsey, page 24:

"* * * Since the restriction in §5219 does not require that the state shall apply the same mode of taxation to national bank shares that it applies to other property provided no injustice, inequality, or unfriendly discrimination arises therefrom, the rate of taxation must refer to 'the actual incidence and practical burden of the tax upon the taxpayer.' * * * (Citing Covington v. First National Bank of Covington, and Amoskeag Savings Bank v. Purdy."

Plaintiff answers that Minnesota v. First National Bank, 273 U. S. 561, effectively disposes of this issue in favor of the plaintiff.

Whether or not the substantial equality from an economic

standpoint of the burden imposed is the proper test under section 5219 and the decision in the Minnesota case is unnecessary to the decision of this case in view of the conclusion to which I have come. However, the fact that the economic burdens imposed by the Michigan Statute are not at great variance is of force in determining whether the legislature in its treatment of taxation of savings/building and loan associations acted upon the grounds of sound public policy or for the purpose of an unfriendly discrimination against national banks.

I find nothing in the proofs or the law to indicate such a hostile intention on the part of the Michigan Legislature. Rather, it appears that such preference as may exist resulting largely from the difference in the character of the two institutions, was in pursuance of an established public policy long existing in the states and long recognized by the courts and by Congress as being justified by the purpose and object of savings/building and loan associations.

Accordingly, I conclude:

1. Since 1887, the Courts have consistently held in every case squarely involving the question that the state may exempt or prefer on the ground of public policy mutual savings bank and other like institutions, provided such exemption is based on just reason and is not made for the hostile purpose of an unfriendly discrimination with national banks.

2. That the power of the State to make such exemptions on the ground of public policy is an important one, grounded in history and on precedent. The intention of Congress to destroy it should not be lightly inferred.

3. The 1923 and 1926 amendments to section 5219 and the amendments to the Federal Reserve Act broadening the powers of the national banks were not intended to take from the State such long established and well recognized power.

4. That from their beginnings and continuously through-

out their history, building and loan associations have been similar in character and purpose to and of the same general class of mutual thrift and home financing institutions as mutual savings banks.

5. That Congress in the Home Owners Loan Act of 1933 definitely recognized and approved such classification of savings/building and loan associations and the propriety of different tax treatments of banks and such associations and in effect, said that money invested in such associations is not moneyed capital in competition with the business of national banks.

6. That Michigan's tax treatment of savings/building and loan associations is based upon just cause and does not evidence an intent to create or foster a hostile or unfriendly discrimination against national banks.

Plaintiff further contends that the Michigan Intangible Tax Act, as amended (M. S. A. 7.556(2a)) imposes a tax "on the privilege of ownership" of shares in national banks, and that section 5219 permits only a tax upon "the shares of national banks" and does not permit a tax upon the "privilege of ownership" of such shares.

It must be agreed that if there is a legal difference between a tax "upon shares," a tax upon "the ownership of shares" and a tax upon the "privilege of ownership" of shares, the Michigan Statute is not too clear as to the type of tax here intended.

The Statute provides that:

> "There is hereby levied upon each * * * *owner of shares* of stock of national banking associations * * * and there shall be collected from each owner an annual specific tax on *the privilege of ownership* of each share of such stock * * *. *The tax on such shares* of stock levied under this section shall be the only tax levied with respect to shares of such associations, banks or trust companies."

In *Goodenough* v. *Department of Revenue,* 328 Mich. 56, the Court, in deciding the nature of the tax imposed by section 2 on intangible personal property generally, had before it substantially the same language, that is:

> "There shall be collected from such owner an annual specific tax on the privilege of ownership of each item of such property owned by him."

The Court quoted with approval from *Dawson* v. *Kentucky Distilleries,* 255 U. S. 288, in which the Court said:

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidence."

The opinion in the Dawson case was written by Justice Brandeis and in it, he further said:

> "To levy a tax by reason of ownership of property is to tax the property." Citing among other cases *Thompson* v. *Kreutzer,* 112 Miss. 165.

In the latter case, the Mississippi Court said:

> "Ownership is not a privilege conferred by government, but is one of the rights which governments were organized to protect. Discarding, then, the word 'privilege' and substituting therefore the proper word 'right,' the distinction here sought to be made by the attorney-general is one without a difference. In a strict legal sense, 'property' (from the Latin word proprius, meaning belonging to one; one's own) is synonymous with the 'right of ownership' and means one's exclusive right of possessing, enjoying, and disposing of a thing. Burdick on Real Property, 2; 2 Blackstone, 2; 6 Words & Phrases (First Series) 5697 et seq.; 23 Am. & Eng. Enc. Law (2nd Ed.), 259; 32 Cyc. 647.
>
> "Property may also be, and in the section of the Constitution here under consideration is, used to signify 'things owned.' In order that a thing may be owned, some one must, of course, have the right to the ownership thereof. A tax on a thing is a tax on all its essential attributes; and a tax on an essential attribute of

> a thing is a tax on the thing itself. So that, a tax on a thing owned is necessarily a tax on the right of ownership thereof; and a tax on the right of ownership of a thing is necessarily a tax on the thing itself. No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed on the right of ownership which is not also a tax on property."

The proofs and the arguments in this case very forcefully demonstrate that the impact of the Michigan tax is upon the shares of plaintiff bank. Judging the tax by its incidence, I find no basis for holding that it is not a tax upon "the shares of national banking associations" within the meaning of that term as used in section 5219.

It is my opinion that the Michigan Intangible Tax Act, as amended, does not violate the Revised Statutes, Section 5219. A judgment may be entered for the defendants.

As I read section 16 of the Court of Claims Act (27.3548 (16)), the matter of costs is one of discretion.

The question here is a public one and one in which the State of Michigan and its various financial institutions are much interested. I do not feel that costs should be awarded against the plaintiff and the judgment shall, therefore, read "without costs."

Fred N. Searl,
Circuit Judge.

APPENDIX B

Michigan Supreme Court Opinion
358 Michigan 611
February 25, 1960

[614] KELLY, J. Plaintiff's action to recover a 1952 deficiency intangibles tax assessment in the amount of $49,929.27 resulted in judgment of no cause of action.

This appeal presents the question of whether CLS 1956, § 205.132a (Stat Ann 1957 Cum Supp § 7.556 [2a]), imposing a tax on bank shares, is invalid because it violates section 5219 of the Revised Statutes of the United States (12 USCA, § 548).

In 1953 (PA 1953, No 9) the legislature amended the intangibles tax law so as to place both State and national banks in a special and more heavily taxed category, imposing a tax on bank shares at the rate of 5½ mills ($5.50 per $1,000) "on the privilege of ownership of each * * * share of stock" based on the "capital account" of each bank. "Capital account" was defined to be the "capital, surplus and undivided profits" as shown on the latest annual report for each year—in this case as of December 31, 1952.

Appellant's position is set forth in its brief as follows:

> "This is not a case of tax avoidance or claimed immunity by appellant. * * * The singularly important and impelling object of this case is to assure tax equality with competitors. The powerful and rapidly growing savings and loan associations (or their shareholders) should be taxed at the same rate as shares in national banks in Michigan, as required under RS § 5219—regardless of what that rate may be."

The validity of the tax imposed under PA 1953, No 9, must rest upon the grant of congressional authority contained in 12 USCA, § 548 (RS § 5219), whereby congress conferred upon the States the power to tax national bank shares, providing that:

[615] "The several States may (1) tax said shares * * * provided the following conditions are complied with: * * *

> "(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

Five intervening national banks asserted that they had similarly paid the 1952 tax under protest and sought to recover the amount so paid. The court, however, confined the proofs to the plaintiff, Michigan National Bank, and adjudicated only plaintiff's case.

The Michigan Bankers Association took a contra view to that of appellant, as is disclosed by the following from the trial court's opinion:

> "The Michigan Bankers Association (representing both State and national banks) has been permitted to file a brief as *amicus curiae* in which it states the position of its members in these words:
>
> "'The Michigan Bankers Association has followed the trial of this case and requested permission to file this brief because of its conviction that the present system of the State of Michigan for the taxation of banks is reasonable from the viewpoint of the public, equitable from the viewpoint of the competitors, and practical from the viewpoint of the banks themselves. Actual experience with the taxation system shows that it has produced a reasonable amount of revenue to the State; that it has not created any competitive disadvantage among the various types of institutions; [616] and that it has proven to be simple to administer. Such a system is obviously desirable, and this association, believing the

system to be entirely legal within the limitations of the Federal Constitution and statutes, does not want to see it destroyed.'

"And their counsel takes substantially the same position upon the several questions presented as does the attorney general on behalf of the defendants."

Plaintiff has its principal banking office in the city of Lansing. It carries on a banking business in that city and in the cities of Battle Creek, Flint, Grand Rapids, Marshall, Port Huron, and Saginaw. In these cities there are 16 building/savings and loan associations.

Appellant was incorporated in 1941, and from December, 1941, to December 31, 1957, appellant had grown in total resources from about $68,000,000 to approximately $481,000,000, without the issuance of any additional common stock except stock dividends.

The transcript of testimony amounted to thousands of pages and hundreds of exhibits were introduced. The printed appendices and briefs consist of more than 1,650 pages.

Plaintiff offered testimony of officers of the loan associations and of plaintiff bank as to the claimed existence of mortgage loan competition between the 2 types of institutions, contending that:

"The *only* important questions are whether the capital employed by savings and loan associations in competition with national banks is substantial compared to the latter's capitalization and whether the residential mortgage loan business is a substantial phase of the business of national banks."

Plaintiff introduced proof in regard to the growth of savings and loan associations to the effect that in 1900 the associations were composed of poor people who had banded themselves together in neighborhood [617] groups, obligating themselves to set aside small weekly savings in order that they might mutually enable other savings members to borrow

to build small homes; that banking facilities were not available to such groups, as national banks had at that time no authority to accept savings accounts nor to engage in the home mortgage loan business; that the associations of today are Statewide and nationwide in operation and their moneyed capital is no longer obtained from nor loaned to the poorer class; that in 1900 the total assets of all associations in Michigan were only slightly over $10,000,000, but by 1952 these assets had increased to over $537,000,000.

Plaintiff also introduced proof that the loaning of money on the basis of mortgages secured by residential real estate, was a substantial phase of its business; that as of December 31, 1952, appellant held aggregate real-estate loans of $62,000,000 and, in addition, had outstanding unsecured loans of approximately $8,000,000 for repair and modernization of residential property; that these loans amounted to approximately 22% of the total assets of appellant bank ($305,802,000); that as of that date the loans secured by mortgages on residential real estate were of the following types: FHA, approximately $27,000,000; VA, $9,000,000; and conventionals, $15,000,000.

Appellant disclosed, by the public records of the register of deeds office in each of the 6 counties where plaintiff's banks were located, that during the year 1952, 2,934 mortgages were recorded by appellant, totalling $23,089,907.33, of which approximately $18,600,000 represented residential real estate loans; and that in the same counties in 1952 the records disclosed that the 16 savings and loan associations recorded 6,498 mortgages totalling $35,575,546.27, some of which, however, were secured by commercial property.

[618] Defendants summarize their position as follows:

> "In the last analysis, savings and loan associations cannot be in 'substantial competition with the business of national banks' because they cannot and do not engage sufficiently in the activities characteristically carried

on by the national banks. Stated another way, if they are not comparable institutions in substance, how can they be in substantial competition?"

To substantiate their position, defendants offered proof showing:

(1) While appellant engaged in all activities permitted national banking associations, including the ability to create checkbook money and receive time, savings, and demand deposits, savings and loan associations were able to engage solely in the narrow activity of making first mortgage loans secured by residential properties (with minor exceptions) or loans on the security of its savings shares accounts.

(2) During 1952 the 16 savings and loan associations doing business in the same cities as appellant bank made total commercial loans secured by business properties amounting to $293,000—.9 of 1% of their total real-estate loans, or about 1/4 of 1% of their total assets. Appellant bank made such loans in the approximate amount of $8,000,000, which constituted 13% of its total real-estate loans and was in excess of 2½% of its total assets. Of loans made by the savings and loan associations, practically all—99.1%—were secured by residential real estate, while only 87% of appellant's mortgage loans were so secured. Of these 87%, 70% or 7/10 were guaranteed by the Federal government as FHA and VA loans. Therefore, only 25% of appellant's mortgages were conventional residential nonbusiness mortgages; 60% were guaranteed FHA and VA [619] mortgages; and 13% were mortgages on commercial property. The 16 associations, on the other hand, carried FHA and VA loans amounting to only 19% of total loans, conventional residential nonbusiness loans amounting to 79.963% of their total loans, and mortgages on commercial property being practically nil.

(3) The total loan activities engaged in by the institutions illustrate different objectives. Only 42% of appellant bank's

total loans were secured by real estate, while 58% were not so secured. All of the associations' loans were secured by real estate.

(4) About 20% of appellant's total assets were employed in mortgage loans and approximately 23% of its interest income was received from mortgage loans. In the loan field, appellant's instalment loans, unsecured by real estate, were the most profitable. Here appellant received approximately 45% of its total interest income from the employment of approximately 19% of its total assets.

(5) In 1952 appellant had total deposits of some $283,000,000, classified into approximately $165,000,000 of commercial deposits (including $22,000,000 of public funds) upon which no interest was paid to the depositors, approximately $37,000,000 in time certificates, and approximately $81,000,000 in savings deposits. In 1952 all the funds it had to loan were from deposits. Appellant used all of its funds—capital, surplus, undivided profits, reserves, and deposits, for the operation of its business. It cannot allocate or trace any dollar of its capital account to any particular mortgage or loan business. The savings and loan associations of Michigan cannot accept deposits, and, therefore, had none.

The court justified its finding of no cause of action by stating its conclusions as follows:

> [620] "1. Since 1887, the courts have consistently held in every case squarely involving the question that the State may exempt or prefer on the ground of public policy mutual savings bank and other like institutions, provided such exemption is based on just reason and is not made for the hostile purpose of an unfriendly discrimination with national banks.
>
> "2. That the power of the State to make such exemptions on the ground of public policy is an important one, grounded in history and on precedent. The intention of congress to destroy it should not be lightly inferred.
>
> "3. The 1923 and 1926 amendments to section 5219

and the amendments to the Federal reserve act broadening the powers of the national banks were not intended to take from the State such long established and well-recognized power.

"4. That from their beginnings and continuously throughout their history, building and loan associations have been similar in character and purpose to and of the same general class of mutual thrift and home financing institutions as mutual savings banks.

"5. That congress in the home owners loan act of 1933 definitely recognized and approved such classification of savings/building and loan associations and the propriety of different tax treatments of banks and such associations and in effect, said that money invested in such associations is not moneyed capital in competition with the business of national banks.

"6. That Michigan's tax treatment of savings/building and loan associations is based upon just cause and does not evidence an intent to create or foster a hostile or unfriendly discrimination against national banks."

The general rule of partial exemption under RS § 5219 has been well established, as is disclosed by the following decisions:

Hepburn v. *School Directors*, 23 Wall (90 US) 480, 485 (23 L ed 112):

[621] "It could not have been the intention of congress to exempt bank shares from taxation because some moneyed capital was exempt. Certainly there is no presumption in favor of such an intention. To have effect it must be manifest. The affirmative of the proposition rests upon him who asserts it."

Adams v. *Nashville*, 95 US 19, 22 (24 L ed 369), in holding that an exemption of investments in municipal bonds did not violate RS § 5219, the court held:

"The act of congress was not intended to curtail the State power on the subject of taxation. It simply required that capital invested in national banks should not be taxed

> at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property, if the legislature chose to do so. * * * The discretionary power of the legislature of the States over all these subjects remains as it was before the act of congress of June, 1864. The plain intention of that statute was to protect the corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing power."

Boyer v. *Boyer*, 113 US 689, 693 (5 S Ct 706, 28 L ed 1089), the court in concluding that the Pennsylvania statute was inconsistent with RS § 5219 distinguished *Hepburn* v. *School Directors*, *supra*, stating:

> "What the court had to decide, and all that it did decide, was whether the exemption from local taxation, of mortgages, judgments, recognizances, and money due upon agreements for the sale of real estate, in the hands of individuals, was a partial exemption only; that is, whether it was so substantial in its nature and operation as to affect the integrity of the general assessment for local purposes. * * * That case is authority for the proposition that a *partial* exemption by a State, for local purposes, of moneyed capital in the hands of individual citizens does not, [622] of itself and without reference to the aggregate amount of moneyed capital not so exempted, establish the right to a similar exemption in favor of national bank shares held by persons within the same jurisdiction."

Mercantile Bank v. *New York*, 121 US 138 (7 S Ct 826, 30 L ed 895). This case is recognized as an important one in interpreting RS § 5219. The court relied upon *Hepburn* v. *School Directors*, *supra*, and in determining that for public policy reasons section 5219 was not violated by State exemptions, the court held (pp 145, 146, 161):

> "The proposition which the appellant seeks to establish is, that the State of New York, in seeking to tax national bank shares, has not complied with the condition contained in section 5219 of the Revised Statutes * * * 'in that, it has by its legislation expressly exempted from

all taxes in the hands of the individual citizens numerous species of moneyed capital, aggregating in actual value the sum of $1,686,000,000, whilst it has by its laws subjected national bank shares in the hands of individual holders thereof (aggregating a par value of $83,000,000), and State bank shares (having a like value of $22,815,700), to taxation upon their full actual value, less only a proportionate amount of the real estate owned by the bank.' This exemption, it is claimed, is of a 'very material part relatively' of the whole, and renders the taxation of national bank shares void. * * *

"The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exemptions should be founded upon just reason, and not operate as an unfriendly discrimination against investments in national bank shares. However large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the [623] taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation."

Tax exemption or preferential tax treatment has been applied to mutual savings banks and savings and loan associations, as is disclosed by the following cases:

Mercantile Bank v. *New York*, 121 US 138, 160 (7 S Ct 826, 30 L ed 895), in construing RS § 5219 and justifying exemptions granted to savings banks, the court said (pp 160, 161):

"It cannot be denied that these deposits constitute moneyed capital in the hands of individuals within the terms of any definition which can be given to that phrase; but we are equally clear that they are not within the meaning of the act of congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must thereby also be exempted from taxation. No one can suppose for a moment that

savings banks come into any possible competition with national banks of the United States. They are what their name indicates, banks of deposit for the accumulation of small savings belonging to the industrious and thrifty. To promote their growth and progress is the obvious interest and manifest policy of the State. Their multiplication cannot in any sense injuriously affect any legitimate enterprise in the community. We have already seen that by previous decisions of this court it has been declared that 'it could not have been the intention of congress to exempt bank shares from taxation because some moneyed capital was exempt;' *Hepburn* v. *School Directors*, 23 Wall (90 US) 480 (23 L ed 112); and that 'the act of congress was not intended to curtail the State power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. [624] It was not intended to cut off the power to exempt particular kinds of property, if the legislature chose to do so.' *Adams* v. *Nashville*, 95 US 19 (24 L ed 369)."

Davenport Bank v. *Davenport Board of Equalization*, 123 US 83, 86 (8 S Ct 73, 31 L ed 94), in upholding exemptions of savings banks, the court again held:

"The whole subject has been recently considered by this court in the case of *Mercantile Bank* v. *New York*, 121 US 138 (7 S Ct 826, 30 L ed 895). In that opinion it was held that, while the deposits in the savings banks of New York constituted moneyed capital in the hands of individuals, yet it was clear that they were not within the meaning of the act of congress in such a sense as to require that because they were exempted from taxation the shares of stock in national banks must also be exempted. The reason given for this is that the institutions generally established under that name are intended for the deposits of the small savings and accumulations of the industrious and thrifty; that to promote their growth and progress is the obvious interest and manifest policy of the State; and, as was said in *Hepburn* v. *School Directors*, 23 Wall (90 US) 480 (23 L ed 112), it could not have been the intention of congress to exempt bank

shares from taxation because some moneyed capital was exempt."

Bank of Redemption v. *Boston,* 125 US 60 (8 S Ct 772, 31 L ed 689). Counsel urged that there was such a marked difference between the Massachusetts and the New York mutual savings banks, the *Mercantile Bank Case, supra,* would not apply. In disposing of this contention, the court therein stated (pp 66-68):

> "The tax on savings banks is based upon deposits merely. This is because deposits furnish the only [625] capital which is invested and employed. The institutions themselves, although corporations, have no capital stock, and are managed by trustees, not selected by the depositors, but by public authority. The whole amount of the deposits, with the exceptions noted, are subjected to a tax of 1/2 of 1%. On the other hand, the national banks pay a tax assessed upon the market value of the shares as personal property, upon a valuation and at a rate exactly equal to that of all other personal property subject to taxation in the State. But shares of the national banks, while they constitute the capital stock of the corporations, do not represent the whole amount of the capital actually employed by them. They have deposits, too, shown in the present record to amount, in Massachusetts, to $132,042,332. The banks are not assessed for taxation on any part of these, although these deposits constitute a large part of the actual capital profitably employed by the banks in the conduct of their banking business. But it is not necessary to establish the exact equality in result of the 2 modes of taxation. The question of the exemption from taxation of deposits in savings banks, as affecting the rule for the State taxation of national bank shares, was very deliberately considered by this court in the case of *Mercantile Bank* v. *New York,* 121 US 138, 160 (7 S Ct 826, 30 L ed 895); and the conclusion reached in that case was reaffirmed in the case of *Davenport Bank* v. *Davenport Board of Equalization,* 123 US 83 (8 S Ct 73, 31 L ed 94). * * *
>
> "It is impossible, in our judgment, to distinguish the present from the case of the New York savings banks,

or of those of Iowa considered in the case of the Davenport Bank. * * *

"It is alleged that in Massachusetts savings banks are permitted to transact a banking business in the way of loans upon personal securities, which assimilates them more closely to national banks, and takes away the reason for the application of the rule to them which was applied to the case of the savings banks of New York. But the difference [626] mentioned, if it exists at all, is immaterial; the main purpose and chief object of savings banks, as organized under the laws of Massachusetts, are the same as those in New York, as considered in the case of the Mercantile Bank. They are substantially institutions, under public management, in pursuance of a great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and not as banking institutions in the commercial sense of that phrase. We adhere to the rule as declared in the cases heretofore decided, which forecloses further discussion."

Aberdeen Bank v. *Chehalis County*, 166 US 440, 460, 461 (17 S Ct 629, 41 L ed 1069). The court reaffirmed the 3 cases cited above, with emphasis on the *Mercantile Bank* decision, and stated:

"As to savings banks it was held that, though it could not be denied that their deposits constituted moneyed capital in the hands of individuals, yet it was clear that they were not within the meaning of the act of congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must also be exempted; that it was part of the policy of the State to encourage the accumulation of small savings belonging to the industrious and thrifty, and it was within the reasonable exercise of the power of the State to exempt particular kinds of property. * * *

"The conclusions to be deduced from these decisions are that money invested in corporations or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments, and investments in mortgages, does not come into competi-

tion with the business of national banks, and is not therefore within the meaning of the act of congress; that such stocks as those in insurance companies may be legitimately taxed on income instead of on value, because such companies are not competitors for business with national banks; and that exemptions, however large, of deposits in [627] savings banks, or of moneys belonging to charitable institutions, if exempted for reasons of public policy and not as an unfriendly discrimination against investments in national bank shares, should not be regarded as forbidden by section 5219 of the Revised Statutes of the United States."

First National Bank of Wellington v. *Chapman,* 173 US 205, 214 (19 S Ct 407, 43 L ed 669):

> "The result seems to be that the term 'moneyed capital,' as used in the Federal statute, does not include capital which does not come into competition with the business of national banks, and that exemptions from taxation, however large, such as deposits in savings banks or moneys belonging to charitable institutions, which are exempted for reasons of public policy and not as an unfriendly discrimination as against investments in national bank shares, cannot be regarded as forbidden by the Federal statute."

The approval of the supreme court of the United States of partial exemptions of mutual savings banks also applies to savings and loan associations, as shown by the following decisions:

Mercantile National Bank of Cleveland v. *Hubbard* (ND Ohio) 98 F 465, 471. Judge Taft wrote the opinion and clearly differentiated between national banks and building and loan associations, stating:

> "There is proof of the capital in savings banks, and also of the capital invested in building and loan associations; but, under the decision of *Mercantile Bank* v. *New York,* 121 US 138 (7 S Ct 826, 30 L ed 895), capital invested in savings banks cannot be regarded as moneyed capital, within the meaning of section 5219, exemption

> of which from taxation can constitute a discrimination within the inhibition of that section. It seems to me that building associations are certainly not to be differentiated in their purpose or object, or practical effect, from savings [628] banks, and that the capital invested in them, though subject to a somewhat different rule of taxation, cannot be regarded as moneyed capital in competition with the moneyed capital in national banks, any more than is capital invested in savings banks. The chief object of building associations is to encourage the building of small houses by poor people, and the saving from their earnings, week by week, of an amount sufficient to pay the mortgage debts incurred in the purchase of the land and the construction of the house. The mere fact that every shareholder in a building association need not be a borrower cannot, I think, change the effect of the general purpose of the building association law."

This case was reversed by the circuit court of appeals in *Mercantile National Bank of Cleveland* v. *Hubbard* (CCA 6), 105 F 809. Upon remand injunction issued in *Mercantile National Bank of Cleveland* v. *Lander* (ND Ohio), 109 F 21. Appeal to the supreme court of the United States resulted in reversal. (*Lander* v. *Mercantile Bank,* 186 US 458 [22 S Ct 908, 46 L ed 1 247]), with specific direction to reverse the circuit court of appeals and affirm the judgment of the circuit court.

In *Hoenig* v. *Huntington National Bank of Columbus* (1932) (CAA 6), 59 F2d 479, 482, certiorari denied 287 US 648 (53 S Ct 93, 77 L ed 560), it was said:

> "It is insisted, however, that the present day building association is a very different type of institution from the 'small, neighborhood, mutual associations of Judge Taft's time,' and emphasis is laid upon the construction of offices in similitude to those of banks, the competition for deposits, the payment of deposits on demand, and the making of loans upon collateral security. We do not think that the general nature of the business of building associations has so far changed as to make the law established by the above-cited cases inapplicable.

Compare *United States* [629] v. *Cambridge Loan & Building Co.*, 278 US 55 (49 S Ct 39, 73 L ed 180). The chief purpose of these institutions is still 'to encourage the building of small houses by poor people, and the saving from their earnings, week by week, of an amount sufficient to pay the mortgage debts incurred in the purchase of the land and the construction of the house.' *Mercantile National Bank* v. *Hubbard* (ND Ohio), 98 F 465, 471."

An examination of the record in the *Hoenig Case* discloses:

1. The assets of the savings and loan associations in Ohio in 1926 were approximately equal to the total assets of all national banks in Ohio; while in 1952 the assets of all savings and loan associations in Michigan constituted less than 15% of the total assets of national banks in Michigan; and

2. The assets of savings and loan associations in Ohio in 1926 were approximately double the total assets of such associations in Michigan in 1952.

Keeping in mind inflation and change in the general status of our economy, the record in the *Hoenig Case* showed that the average investment in the Ohio associations was about $500 compared to approximately $1,500 in Michigan in 1952, and the average outstanding loan was $2,806 in 1926, at the time the *Hoenig Case* was decided, while the average outstanding loan of Michigan associations in 1952 was $4,872.

The home owners' loan act was enacted by congress in 1933 (ch 64, §§ 1-9, 48 Stat 128 [12 USCA, §§ 1461-1468, inclusive, as amended]). The purpose of the act is set forth in section 5 (12 USCA, § 1464, as amended) as follows:

"(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the board is authorized, under such rules and regulations [630] as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'federal savings and loan

associations,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States."

In determining States' rights to tax such associations, congress provided in the same section:

"(h) Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States (except the taxes imposed by sections 1410 and 1600 of title 26 with respect to wages paid after December 31, 1939, for employment after such date, and except, in the case of taxable years beginning after December 31, 1951, income, war-profits, and excess-profits taxes), and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions."

The trial court commented upon congressional action disclosing that congress did not consider savings and loan associations to be in competition with either State or national banks, and in its opinion said:

"In providing for the taxation of these institutions by the State, congress could have made the measuring stick, the limit on the rate of taxation, that imposed on national banks, also a creation of congress. It could have made such measuring stick the rate imposed by the States on State banks and [631] it could have made it that imposed on other moneyed capital. It did none of these things. Instead, it provided that the tax imposed should not be greater than that imposed on 'other similar local mutual or cooperative thrift and home financing institutions.'

> "Congress thus identified the institutions that it considered to be in competition with Federal savings and loan associations. Obviously, congress did not consider savings and loan associations to be in competition with banks, either State or national."

The home owners' loan act of 1933 provision markedly differs with the provision in regard to States' rights to tax joint-stock land banks (act of congress July 17, 1916, ch 245, § 26, 39 Stat 380) where congress provided:

> "Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the bank is located; but such assessment and taxation shall be in manner and subject to the conditions and limitations contained in section 5219 of the Revised Statutes with reference to the shares of national banking associations."*

The congressional provision for national agricultural credit corporations (act of congress March 4, 1923, ch 252, title 2, § 211, 42 Stat 1469) also provided a different test for State taxation than congress provided for Federal savings and loan associations, as is disclosed by the following:

> "Taxation by a State of the shares in national agricultural credit corporations, or of dividends derived therefrom, or of the income of said corporations, or real estate owned by them, shall be such only as is or may be authorized by law in the case of national banking associations; and taxation by a [632] State of the debentures or other obligations of such corporations shall not be at a higher rate than the rate applicable to other moneyed capital in the hands of individual citizens thereof."*

The following decisions disclose that because plaintiff bank's shares were taxed at a different rate, or assessed by a different method than the method employed to tax the building and loan associations, does not violate RS § 5219:

---

*12 USCA, § 932—Reporter.

*12 USCA, § 1261—Reporter.

Tradesmens National Bank of Oklahoma City v. *Oklahoma Tax Commission* (1940), 309 US 560, 567 (60 S Ct 688, 84 L ed 947):

> "A consideration of the course of judicial decision on RS § 5219 and its predecessors can leave no doubt that the various restrictions it places on the permitted methods of taxation are designed to prohibit only those systems of State taxation which discriminate in practical operation against national banking associations or their shareholders as a class. Compare *First National Bank* v. *City of Hartford*, 273 US 548 (47 S Ct 462, 71 L ed 767, 59 ALR 1); *Amoskeag Savings Bank* v. *Purdy*, 231 US 373 (34 S Ct 114, 58 L ed 274); *Covington* v. *First National Bank of Covington*, 198 US 100 (25 S Ct 562, 49 L ed 963); *Lionberger* v. *Rouse*, 9 Wall (76 US) 468 (19 L ed 721). Thus it is not a valid objection to a tax on national bank shares that other moneyed capital in the State or shares of State banks are taxed at a different rate or assessed by a different method unless it appears that the difference in treatment results in fact in a discrimination unfavorable to the holders of the shares of national banks. *Amoskeag Savings Bank* v. *Purdy, supra; Covington* v. *First National Bank of Covington, supra.*"

Covington v. *First National Bank of Covington* (1905), 198 US 100, 114, 115 (25 S Ct 562, 49 L ed 963):

> [633] "As to the alleged discrimination against shareholders in national banks because the assessment of the property of State banks is upon the franchise and not upon the shares of stock, there is nothing in the bill to show that this difference in method operates to discriminate against national bank shareholders by assessing their property at higher rates than are imposed upon capital invested in State banks. And as to the deduction of the value of real estate and other deductions allowed to State banks, the supreme court of Kentucky has held that all deductions allowed to State banks must be allowed in like manner in assessing the property of shareholders in national banks, *Commonwealth* v. *Citizens' National Bank*, 117 Ky 946 (80 SW 159). Nor does the

allegation that in cities of the first, second, and third class State banks are assessed upon their shares for city taxation, but upon their franchises and property for State and county taxation, in the absence of averments of fact showing that thereby a heavier burden of taxation is imposed upon national than State banks in such cities, warrant judicial interference for the protection of shareholders in national banks. *Davenport Bank* v. *Davenport Board of Equalization*, 123 US 83 (8 S Ct 73, 31 L ed 94)."

People v. *Weaver* (1879), 100 US 539 (25 L ed 705), held that the restriction contained in the act of congress (section 5219) had to do with the actual incidence and practical burden of the tax upon the taxpayer.

Appellees introduced testimony, which was not controverted, that building and loan associations pay taxes which appellant bank does not pay (franchise, capital stock increase, use, and personal property taxes), and further disclosed that the ratio of State and local taxes to total assets of the associations was .089, while appellant's rate was .091; and, also, in regard to the proportion of the intangible tax [634] to the total assets of national banks in Michigan and the proportion of the Michigan franchise tax to the total assets of all savings and loan associations showing a ratio of .02459 for all Michigan national banks and .02243 for all State savings and loan associations.

In dealing with the phrase "coming into competition with the business of national banks" as used in RS § 5219, the court in *First National Bank of Guthrie Center* v. *Anderson, County Auditor* (1926), 269 US 341 (46 S Ct 135, 70 L ed 295), stated (pp. 347, 348):

"The earlier decisions have been reviewed from time to time in later cases, and all, taken collectively, may be summarized as showing, so far as is material here

"1. The purpose of the restriction is to render it impossible for any State, in taxing the shares, to create and foster an unequal and unfriendly competition with na-

tional banks, by favoring shareholders in State banks or individuals interested in private banking or engaged in operations and investments normally common to the business of banking. *Mercantile Bank* v. *New York*, 121 US 138, 155 (7 S Ct 826, 30 L ed 895); *Des Moines National Bank* v. *Fairweather*, 263 US 103, 116 (44 S Ct 23, 68 L ed 191).

"2. The term 'other moneyed capital' in the restriction is not intended to include all moneyed capital not invested in national bank shares, but only that which is employed in such way as to bring it into substantial competition with the business of national banks. *Mercantile Bank* v. *New York, supra*, 157; *Aberdeen Bank* v. *Chehalis County*, 166 US 440, 461 (17 S Ct 629, 41 L ed 1069).

"3. Moneyed capital is brought into such competition where it is invested in shares of State banks or in private banking; and also where it is employed, substantially as in the loan and investment features [635] of banking, in making investments, by way of loan, discount or otherwise, in notes, bonds, or other securities with a view to sale or repayment and reinvestment. *Mercantile Bank* v. *New York, supra*, 155-157; *Palmer* v. *McMahon*, 133 US 660, 667, 668 (10 S Ct 324, 33 L ed 772); *Talbot* v. *Silver Bow County*, 139 US 438, 447 (11 S Ct 594, 35 L ed 210).

"4. The restriction is not intended to exact mathematical equality in the taxing of national bank shares and such other moneyed capital, nor to do more than require such practical equality as is reasonably attainable in view of the differing situations of such properties. But every clear discrimination against national bank shares and in favor of a relatively material part of other moneyed capital employed in substantial competition with national banks is a violation of both the letter and spirit of the restriction. *People* v. *Weaver*, 100 US 539 (25 L ed 705); *Boyer* v. *Boyer*, 113 US 689, 701 (5 S Ct 706, 28 L ed 1089); *First National Bank of Wellington* v. *Chapman*, 173 US 205, 216 (19 S Ct. 407, 43 L ed 669)."

Building and loan associations are incorporated in Michigan under PA 1887, No. 50, as amended, and the purpose of such associations is set forth in section 1,* as follows:

> "Building and improving homesteads, * * * accumulating money to be loaned to its members * * * or assisting its members to accumulate and invest their savings."

Section 37 of the act provides:

> "No building and loan association shall, directly or indirectly, do a banking business." (CL 1948, § 489.37 [Stat Ann 1957 Rev § 23.580]).

The fundamental difference between a bank making loans from deposits and loans made otherwise, was recognized in *First National Bank of Shreveport* [636] v. *Louisiana Tax Commission* (1933), 289 US 60, 64 (53 S Ct 511, 77 L ed 1030, 87 ALR 840), where it is said:

> "If we may take judicial notice of the functions of these alleged competitors of the plaintiffs, there appears ample basis for the classification, among other things, in this: There is a fundamental difference between banks, which make loans mainly from money of depositors, and the other financial institutions, which make loans mainly from the money supplied otherwise than by deposits."

Appellant relies on *First National Bank of Hartford* v. *City of Hartford* (1927), 273 US 548 (47 S Ct 462, 71 L ed 767, 59 ALR 1), and states that the trial court:

> "Erroneously predicated his decision upon the proposition that savings and loan associations were different in character and in purpose from national banks, and, therefore, could not compete as a matter of law, within the meaning of RS § 5219. This is directly contrary to the ruling of the United States supreme court that:
>
> "'Competition in the sense intended [by RS § 5219] arises not from the character of the business of those who compete but from the manner of the employment of the capital at their command.' *First National Bank of Hartford* v. *City of Hartford* (1927), 273 US 548, 557."

*See CL 1948, §489.1 (Stat Ann 1957 Rev. § 23.541)—Reporter.

Appellant, recognizing that its contention was contrary to the cases above cited allowing partial exemption for savings banks and building and loan associations (and particularly was this true in regard to *Bank of Redemption* v. *Boston*, 125 US 60 [31 L ed 689]) states:

> "However, a contention was made by the plaintiff national bank that Massachusetts savings banks were permitted to transact a banking business in the way [637] of loans upon personal securities which more closely assimilated them to national banks, than to the savings banks such as were involved in *Mercantile (Mercantile Bank* v. *New York)*. This argument the court summarily considered and dismissed, saying (in *Bank of Redemption* v. *Boston, supra*, 68):
>
> "'But the difference mentioned, if it exists at all, is immaterial; the main purpose and chief object of savings banks, as organized under the laws of Massachusetts, are the same as those in New York, as considered in the case of the *Mercantile Bank*. They are substantially institutions, under public management, in pursuance of a great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and not as banking institutions in the commercial sense of that phrase.'
>
> "To the extent that this case stands for the proposition that the character, object, and purpose of an institution claimed to be in competition with a national bank was determinative rather than the manner of employment of its capital, this case must be deemed to be overruled by the later cases which held, as stated in *First National Bank of Hartford* v. *Hartford* (1927), *supra*, 557, 558:
>
> "'Section 5219 is not directed merely at discriminatory taxation which favors a competing banking business. Competition in the sense intended arises not from the character of the business of those who compete but from the manner of the employment of the capital at their command. * * * To so restrict the meaning and application of section 5219 would defeat its purpose.'"

We do not agree with appellant that the *Hartford* decision overruled the *Bank of Redemption Case,* but agree with appellees' answer:

> "Appellant attempts to persuade us that the *Bank of Redemption* decision was overruled by *First National Bank of Hartford* v. *Hartford,* 273 US 548. There is utterly nothing in the *Hartford* decision [638] which expressly or impliedly undertakes a repudiation of *Bank of Redemption. Hartford* was addressed to a situation where sweeping preferences were granted to large areas of competing money capital."

The *Hartford* decision established that a mixed question of fact and law is involved in determining the question of "substantial competition" and stated (p 552):

> "The validity of the tax complained of depends upon whether or not the moneyed capital in the State thus favored is employed in such a manner as to bring it into substantial competition with the business of national banks.
>
> "The question thus raised involves considerations both of fact and of law. To answer it, it is necessary to ascertain the nature and extent of the moneyed capital in the hands of individual citizens within the State and the relation of its employment, in point of competition, to the business of plaintiff and other national banks. It is necessary also to ascertain the precise meaning to be given the statute as applied to the facts in hand in order to determine whether the particular moneyed capital and the particular competition with which we are here concerned are moneyed capital and competition within the spirit and purpose of the statute. The question is thus a mixed one of law and fact, and in dealing with it we may review the facts in order correctly to apply the law."

Not only did the *Hartford* decision deal with sweeping exemptions for a large number of competing institutions, but the equivalence of the tax imposed on national banks and other institutions was not considered, as evidence by the following (pp 551, 552):

> "The court below assumed, and it was not questioned upon the argument here, that this tax is not to be taken as an equivalent or substitute for the *ad* [639] *valorem* tax levied upon bank shares and no question of the possible equivalence of the 2 schemes of taxation is presented."

First National Bank of Hartford v. *City of Hartford, supra,* established that "approximate equality in taxation" was a major test, by stating at page 560:

> "But a consideration of the entire course of judicial decision on this subject can leave no doubt that State legislation and taxing measures which by their necessary operation and effect discriminate against capital invested in national bank shares in the manner described are intended to be forbidden."

The record in this appeal discloses that Michigan building and loan associations operated in a narrow, restricted field, are markedly different in character, purpose and organization from national banks, and are not in "substantial competition" with national banks.

The record establishes that there was practical equality of the total tax imposed upon building and loan associations and upon national banks, and any difference would be justified as partial exemptions under the decisions of the supreme court of the United States quoted above. The restriction contained in RS § 5219 has to do with the actual incidents and practical burden of the tax imposed. (See *People* v. *Weaver,* 100 US 539 [25 L ed 705].)

Appellant, as a taxpayer claiming immunity from the tax, had the burden of establishing its right to the exemption. There is no presumption of unlawful discrimination or that Michigan PA 1953, No. 9, imposed a tax "at a greater rate than [was] assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks." To meet this test, appellant had to introduce proof that was "manifest." (See *Hepburn* v. *School Directors,* 23 Wall [640] [90 US] 480 [23 L ed

112], and *Norton Company* v. *Department of Revenue of Illinois*, 340 US 534 [71 S Ct 377, 95 L ed 517].) Plaintiff failed to meet this burden of proof.

We reiterate and approve the finding of the trial court:

> "That Michigan's tax treatment of savings/building and loan associations is based upon just cause and does not evidence an intent to create or foster a hostile or unfriendly discrimination against national banks."

Affirmed. No costs, a public question involved.

DETHMERS, C. J., and CARR, SMITH and EDWARDS, JJ., concurred.

KAVANAGH and BLACK, JJ., did not sit.

SOURIS, J., took no part in the decision of this case.

APPENDIX C

Judgment of Michigan Supreme Court

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 25th day of February in the year of our Lord one thousand nine hundred and sixty.

Present the Honorable

JOHN R. DETHMERS,
Chief Justice,
LELAND W. CARR,
HARRY F. KELLY,
TALBOT SMITH,
GEORGE EDWARDS,
Associate Justices.

Michigan National Bank,
Plaintiff and Appellant,
vs. 48138
Department of Revenue, et al.,
Defendants.

The record and proceedings in this cause having been brought to this Court by appeal from the Court of Claims, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Court, there is no error, Therefore it is ordered and adjudged that the judgment of said Court of Claims be and the same is hereby in all things affirmed, and that no costs be awarded herein.

APPENDIX D

(R. S. 5219)

United States Code, Title 12

NATIONAL BANK SHARES

§548. State taxation.

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with;

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corpora-

tions doing business within its limits: Provided, however, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the state on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. (R.S. § 5219; Mar. 4, 1923, ch. 267, 42 Stat. 1499; Mar. 25, 1926, ch. 88, 44 Stat. 223.)

APPENDIX E

Act No. 9, Public Acts of 1953

An act to amend section 2a of Act No. 301 of the Public Acts of 1939, entitled as amended "An act to provide for the imposition and the collection of a specific tax upon the privilege of ownership of intangible personal property; to provide for the disposition of the proceeds thereof; to prescribe the powers and duties of the department of revenue with respect thereto; to prescribe penalties; to make an appropriation to carry out the provisions of this act; and to repeal all acts and parts of acts inconsistent with the provisions of this act," as added by Act No. 182 of the Public Acts of 1952, being section 205.132a of the Compiled Laws of 1948.

The People of the State of Michigan enact:

Section amended.

Section 1. Section 2a of Act No. 301 of the Public Acts of 1939, as added by Act No. 182 of the Public Acts of 1952, being section 205.132a of the Compiled Laws of 1948, is hereby amended to read as follows:

205.132a. Intangibles tax; stock of banks and trust companies; capital account definition; date of payment of tax. [M.S.A. 7.556 (2a)]

Sec. 2a. For the calendar year 1952, in lieu of the tax imposed by this section prior to this amendatory act, and for each year thereafter, or a portion thereof, there is hereby levied upon each resident or nonresident owner of shares of stock of national banking associations located in this state and banks and trust companies organized under the laws of this state, and there shall be collected from each such owner an annual specific tax on the privilege of ownership of each such share of stock, whether or not it is income producing, equal in the case of a share of common stock to 5½ mills upon each dollar of the capital account of such association, bank or

trust company represented by such share, and equal in the case of a share of preferred stock to 5½ mills upon the par value of such share. "Capital account" as referred to herein shall be determined by adding the common capital, surplus and undivided profits accounts exactly as they appear on the report as of the latest date during the year for which the tax is imposed prepared by such association, bank or trust company for the public authority having general regulatory supervision over it, and the dollar amount of the capital account represented by each share of its common stock shall be determined by dividing such capital account by the number of shares of such common stock outstanding at the date of such report. The tax on such shares of stock levied under this section shall be the only tax levied with respect to shares of such associations, banks or trust companies.

The tax imposed by the provisions of this section 2a for the calendar year 1952 shall be due and payable on or before 45 days after the effective date of this section 2a and that so imposed for each year thereafter shall be due and payable as provided for in section 4 of this act.

Notwithstanding anything to the contrary contained in any other provision of this act, the amount of all taxes paid by any such association, bank or trust company on behalf of its shareholders for the calendar year 1952 in accordance with any provision or provisions of this act in effect prior to the effective date of this section 2a shall be credited as a payment against the tax imposed on the shares of such association, bank or trust company for the calendar year 1952 under this section 2a.

This act is ordered to take immediate effect.

Approved March 25, 1953.